Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1998

ELLIS W. LAY, individually and d/b/a WINTERGREEN NURSERIES, *et al.*,

Petitioners,

v.

E.I. DU PONT DE NEMOURS AND COMPANY, a Delaware Corporation; and ALSTON & BIRD, a Georgia Partnership,

Respondents.

And

WARREN KOBATAKE, *et al.*,

Petitioners,

v.

E.I. DU PONT DE NEMOURS AND COMPANY, a Delaware Corporation; and ALSTON & BIRD, a Georgia Partnership, including Professional Corporations,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can an independent action, preserved by FED. R. CIV. P. 60(b), seeking equitable relief from a federal judgment procured by fraud on the court (discovered after settlement), be categorically dismissed by a federal court because of a general release interpreted under state law?

LIST OF PARTIES AND RULE 29.6 LIST

The names of all parties to the two proceedings consolidated for appeal by the court below are as follows:

Ellis W. Lay, et al. v. E.I. du Pont de Nemours & Company, et al.

1. Ellis W. Lay, individually and d/b/a Wintergreen Nurseries;
2. Prince Nurseries, Inc., a North Carolina Corporation;
3. James Oliver Prince, Jr.;
4. James Oliver Prince, Sr.;
5. Lynn Hayes, individually and d/b/a Lynn's Nurseries;
6. Thomas O. Mahaffey, Jr. Greenhouse, Inc., a Florida Corporation;
7. Thomas O. Mahaffey, Jr.;
8. George S. Ferguson and Jacqueline D. Ferguson, individually and d/b/a Scrub Oak Foliage;
9. Plants, Inc. a Texas Corporation;
10. Huntsville Greenhouse Corporation, a Texas Corporation;
11. Murphy Properties, a Texas General Partnership;
12. Fletcher C. Murphy, Jr.; and
13. Martha C. Murphy.

Petitioners Prince Nurseries, Inc.; Thomas O. Mahaffey, Jr. Greenhouse, Inc.; Plants, Inc.; Huntsville Greenhouse Corporation have no parent companies and no subsidiaries.

LIST OF PARTIES AND RULE 29.6 LIST – Continued

Warren Kobatake, et al. v. E.I. du Pont de Nemours & Company, et al.

1. Warren Kobatake;
2. Pleasonton Corporation, a Hawaii Corporation;
3. Malcolm R. Saxby; and
4. Puna Certified Nursery, a Hawaii Corporation.

Petitioners Pleasonton Corporation and Puna Certified Nursery have no parent companies and no subsidiaries.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iv

OPINIONS AND ORDERS BELOW 1

JURISDICTION 1

STATUTE AND RULES INVOLVED 1

STATEMENT OF THE CASE 3

A. The Underlying *Bush Ranch* Litigation 3

B. Discovery of The Scheme to Withhold Evidence 5

C. The District Court Proceedings 7

D. The Eleventh Circuit Proceedings 8

REASONS FOR GRANTING THE WRIT 8

A FEDERAL COURT'S INHERENT RIGHT TO PROTECT ITSELF AND ITS LITIGANTS FROM FRAUD OVERRIDES APPLICATION OF STATE SUBSTANTIVE CONTRACT LAW REGARDING A RELEASE 8

CONCLUSION 18

APPENDIX

1. Opinion issued by the United States Court of Appeals for the Eleventh Circuit, dated December 3, 1998 ..... App. 1

2. Order issued by the Honorable Richard J. Freeman, dated July 17, 1997 ..... App. 17

TABLE OF CONTENTS – Continued

Page

3. Order denying Petition For Rehearing and Suggestion For Rehearing *En Banc*, *Ellis W. Lay et al. v. E.I. du Pont de Nemours & Company et al.* and *Warren Kobatake et al. v. E.I. du Pont de Nemours & Company et al.*, dated January 29, 1999.....App. 31

4. Petition For Rehearing and Suggestion for Rehearing *En Banc*, *Ellis W. Lay et al. v. E.I. du Pont de Nemours & Company et al.*, filed December 24, 1998.....App. 33

5. *Ellis W. Lay et al. v. E.I. du Pont de Nemours & Company et al.*, Complaint, filed September 6, 1996.....App. 64

6. *Ellis W. Lay et al. v. E.I. du Pont de Nemours & Company et al.*, First Amended Complaint, filed November 8, 1996.....App. 72

7. *Warren Kobatake et al. v. E.I. du Pont de Nemours & Company et al.*, Complaint, filed September 19, 1996.....App. 81

8. *In re E.I. DuPont De Nemours & Company – Benlate Litigation*, 99 F.3d 363 (11th Cir. 1996).....App. 87

9. *Kawamata Farms, Inc. v. United Agri Products*, 86 Hawai'i 214, 948 P.2d 1055 (1997).....App. 109

10. *Davis Tree Farms, Inc. v. E.I. du Pont de Nemours & Company et al.*, No. 92-20006 (CA 23) (Fla. Cir. Ct. Aug. 5, 1996), *vacated following settlement* August 6, 1996, available at <<http://www.courttv.com/legaldocs/business/dupont.html>>.....App. 220

11. Copies of Materials from the Record On Appeal from *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944) Containing Reference to a Release.....App. 239

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Yungkao, 329 U.S. 482 (1947) 8

Davis Tree Farms, Inc. v. E.I. du Pont de Nemours & Company, No. 92-20006 (CA 23) (Fla. Cir. Ct. Aug. 5, 1996), vacated following settlement, August 6, 1996 ..... 6, 7

Hanna v. Plumer, 380 U.S. 460 (1965) 9, 14, 16

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944) 9, 10, 11, 15

In re: E.I. du Pont de Nemours & Company – Benlate Litigation, 99 F.3d 363 (11th Cir. 1996) 3, 4, 5, 10

Ira S. Bushey & Sons, Inc. v. E.E. Hedges Transp. Corp., 167 F.2d 9 (2d Cir. 1948) 13

Johnson Chem. Co. v. Condado Center, 453 F.2d 1044 (1st Cir. 1972) 13

Johnson v. New York, N.H. & H.R. Co., 344 U.S. 48 (1952) 8

Kawamata Farms, Inc. v. United Agri Products, 86 Hawai'i 214, 948 P.2d 1055 (1997) 5, 6, 10

Kobatake v. E.I. du Pont de Nemours & Company, 162 F.3d 619 (11th Cir. 1998) 1, 10, 12

Lustgarten v. Felt, 92 F.2d 277 (3d Cir. 1937) 13

Matsuura v. Alston & Bird, 166 F.2d 1006 (9th Cir. 1999) 13, 16

May v. Moss, 212 F.2d 400 (8th Cir. 1954) 13

Mississippi Pub. Co. v. Murphree, 326 U.S. 438 (1946) 8

TABLE OF AUTHORITIES – Continued

Page

Robinson v. Volkswangenwerk AG, 56 F.3d 1268 (10th Cir. 1995), cert. denied, 516 U.S. 1045 (1996) 13

Sibbach v. Wilson & Co., 312 U.S. 1 (1941) 14

Simons v. United States, 452 F.2d 1110 (2d Cir. 1971) 13

Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers, 357 U.S. 197 (1958) 8

South Mark Properties v. Charles House Corp., 742 F.2d 862 (5th Cir. 1984) 13

Swift & Co. v. United States, 276 U.S. 311 (1928) 14

Thompson v. Maxwell, 95 U.S. 391 (1877) 14

United States v. Beggerly, 118 S.Ct. 1862 (1998) 9, 16

Vassos v. Societa Trans-Oceanica Canopus, S.A., 272 F.2d 182 (1959), cert. denied, 362 U.S. 935 (1960) 13

Walker v. Armco Steel Corp., 446 U.S. 740 (1980) 14

Wiedemann v. Galiano, 722 F.2d 335 (7th Cir. 1983) 13

Willy v. Coastal Corp., 503 U.S. 131 (1992) 8

STATUTES AND RULES

Rules Enabling Act, 28 U.S.C. § 2072 .....1, 14

Federal Rule of Civil Procedure 60(b), Advisory Committee Notes ¶ 7 (1946 Amendments) 12

Federal Rule of Civil Procedure 60(b) ..... *passim*

PETITION FOR CERTIORARI

Petitioners respectfully pray that a writ of *certiorari* issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit entered in these consolidated cases on December 3, 1998.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 162 F.3d 619 (1998) and is reprinted in the Appendix ("App.") at 1.

The opinion and order of the District Court is not reported, and is reprinted at App. 17.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on December 3, 1998. Petitioners filed a timely Suggestion for Rehearing *En Banc*, which was denied on January 29, 1999. *See* App. at 31. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The relevant portion of the Rules Enabling Act, 28 U.S.C. § 2072, provides:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the

United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

* * *

Federal Rule of Civil Procedure 60(b) provides:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its

operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

A. The Underlying *Bush Ranch* Litigation

In 1991, Petitioners brought products liability cases against Respondent E.I. du Pont de Nemours and Company ("du Pont") in the United States District Court for the Middle District of Georgia. The Petitioners, commercial nursery operators, sought recovery for damages to their plants and businesses caused by Benlate 50 DF, an agricultural fungicide manufactured by du Pont. *See In re: E.I. du Pont de Nemours & Company – Benlate Litigation*, 99 F.3d 363, 365-66 (11th Cir. 1996); App. at 88. Petitioners' cases were consolidated for discovery purposes with cases brought by other growers also represented by Petitioners' counsel. The plaintiffs' theory was that du Pont's fungicide Benlate was contaminated with herbicides, and as a result, application of contaminated Benlate caused injury to the plants and soils. *Id.* During discovery, du Pont tested soil samples from plaintiffs' nurseries. There

were Orders of the district court in place at the time of those tests obligating du Pont and its lawyers, Respondent Alston & Bird ("Alston & Bird"), to produce all Benlate test data and reports. *Id.* at 373; App. at 108.

In July 1993, four of those cases referred to as the *Bush Ranch* cases,[1] were the first of the hundreds of pending lawsuits to actually go to trial. Because of the billions of dollars sought by the growers in those pending lawsuits, du Pont deemed it imperative to win *Bush Ranch* at all costs.

During trial du Pont and its lawyers did *not* produce the raw data from the soil tests, but instead, generated and presented a false summary report purported to reflect the test results. That false summary report was contrived, with the assistance of du Pont's attorneys, to show no detection of the contaminants. An expert's perjured testimony was used to present the false summary as proof that there was no evidence of contaminants. *See In re: E.I. du Pont de Nemours & Company – Benlate Litigation*, 99 F.3d 363, 365-66 (11th Cir. 1996); App. at 88-91. Those false summaries were the lynchpin of du Pont's and Alston & Bird's jury arguments that there were no contaminants in the *Bush Ranch* plaintiffs' soils.

While the jury was deliberating, Petitioners and others represented by the *Bush Ranch* litigants' counsel settled their lawsuits, and afterwards entered into settlement agreements, executed Releases, and a joint consent

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[1] The lawsuit filed by Petitioner Warren Kobatake and his company Petitioner Pleasonton Corporation was one of the four *Bush Ranch* cases that went to trial in July 1993.

motion to dismiss all of the pending actions. The Releases contain a choice of law provision applying Georgia law to govern the Release. Upon joint motion by the parties, the District Court then entered a judgment dismissing the pending lawsuits with prejudice.

B. Discovery of the Scheme to Withhold Evidence

Following settlement of the *Bush Ranch* cases, litigants in *Kawamata Farms*, a Benlate action in Hawaii state court, issued discovery seeking the *Bush Ranch* test results. Over one year after the *Bush Ranch* settlement, and with vigorous opposition all the way to the Supreme Court of Hawaii, du Pont and its lawyers were sanctioned and compelled to produce the *Bush Ranch* test results referred to as the "Alta raw data." *See Kawamata Farms, Inc. v. United Agri Products*, 86 Hawai'i 214, 948 P.2d 1055, 1066-68 (1997); App. at 119-23. The Eleventh Circuit held that the same Alta raw data could be interpreted by experts as proof that Benlate was contaminated. *See In re: E.I. du Pont de Nemours & Company – Benlate Litigation*, 99 F.3d 363, 365-66 (11th Cir. 1996); App. at 89. The Eleventh Circuit also recognized that "DuPont and its counsel may very well have engaged in criminal acts." Id. at 369; App. at 98.

A second group of evidence concealed from Petitioners surfaced during the *Kawamata Farms* litigation. This group of evidence known as the "BAM documents" or "Exhibit P-9369A" are the results of over 900 laboratory tests du Pont conducted between 1987 and 1991 that showed Benlate was contaminated with various herbicides. *Kawamata Farms, Inc.*, 948 P.2d at 1065; App. at

117-18. The BAM documents would have provided additional proof that Benlate was defective and caused damage to Petitioners' plants.[2]

Yet a third group of evidence concealed by du Pont surfaced in 1996 during discovery in a Benlate action in Florida state court. *See Davis Tree Farms, Inc. v. E.I. du Pont de Nemours & Company*, No. 92-20006 (CA 23) (Fla. Cir. Ct. Aug. 5, 1996), *vacated following settlement*, August 6, 1996, available at <<http://www.courttv.com/legaldocs/business/dupont.html>>; App. at 222. The third group concerns the existence of a Benlate field test conducted by du Pont in Costa Rica in 1992 where all of the test plants died after application of Benlate. Du Pont destroyed the plants and evidence and concealed those tests from Petitioners and other Benlate litigants. When presented with evidence that du Pont and its lawyers concealed the existence of the Costa Rican field tests and destroyed that evidence, the Florida state court struck du Pont's Answer and put it in default.[3]

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[2] The Hawaii Supreme Court in discussing du Pont's actions stated, "In light of the strong public policy against litigants committing fraud within the courts, we hold, based on the egregious nature of the fraud by DuPont in this case, that the circuit court did not abuse its discretion when it granted the Plaintiffs and Declaratory Defendants affirmative relief. . . . " *Kawamata Farms, Inc.*, 948 P.2d at 1099; App. at 209.

[3] In its Order striking du Pont's Answer, the Circuit Court of Florida for the Eleventh Judicial Circuit found as follows:

> This Court determines that DuPont has engaged in a systematic design to thwart discovery. This Court further finds that DuPont's conduct in this regard is so atrocious that it shocks the conscious of this Court. . . . . DuPont has purposefully set upon a

C. The District Court Proceedings

The instant action[4] was brought, *inter alia*, as an independent action seeking equitable relief for fraud on the court perpetrated by du Pont and Alston & Bird, during discovery and litigation of the *Bush Ranch* cases.[5] Petitioners' Complaints were filed in September 1996.[6] Respondents filed Motions to Dismiss in October 1996. The Third Cause of Action asserted in the *Lay* Complaint specifically states a claim for equitable relief for fraud on the court. App. at 67. The Third Cause of Action in the *Lay* First Amended Complaint also states a claim for equitable relief for fraud on the court making specific reference to the claim as an "Independent Action Recognized In FRCP 60(b)." App. at 75-76.

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course of conduct that has served as a complete denial of Plaintiffs' right to have its day in court. This Court has no choice but to strike DuPont's pleadings and enter a default judgment. *Davis Tree Farm, Inc.*, at p. 10; App. at 238.

[4] The District Court dismissed both the *Lay et al.* action and *Kobatake et al.* action with its Order dated July 17, 1997; App. at 17. By motion in the Eleventh Circuit, both actions were consolidated for appeal.

[5] The *Lay* Petitioners stated claims based on state law for fraud, intentional nondisclosure of material fact, rescission, civil conspiracy, abuse of process, infliction of emotional distress, spoliation of evidence, public nuisance, and violation of Georgia Fair Business Practice Act. This Petition does not address those causes of action based on the Eleventh Circuit's interpretation of substantive state law applied to the releases.

[6] On November 8, 1996, the *Lay* Petitioners filed an Amended Complaint as a matter of right.

By Order dated July 17, 1997, the District Court granted Respondents' Motions to Dismiss, applying substantive Georgia contract law regarding the Releases to categorically bar Petitioners' equitable independent fraud on the court claims preserved by Rule 60(b) of the Federal Rule of Civil Procedure, and the other related claims asserted.

D. The Eleventh Circuit Proceedings

Following briefing and oral argument, the Eleventh Circuit issued the published, *per curiam* opinion affirming the District Court's dismissal and adopting the District Court's July 17, 1997 Order as the opinion of the Eleventh Circuit. App. at 1.

REASONS FOR GRANTING THE WRIT

A FEDERAL COURT'S INHERENT RIGHT TO PROTECT ITSELF AND ITS LITIGANTS FROM FRAUD OVERRIDES APPLICATION OF STATE SUBSTANTIVE CONTRACT LAW REGARDING A RELEASE.

1. This Petition raises a significant issue concerning the application of the Federal Rules of Civil Procedure, a traditional ground for this Court's exercise of review. *See, e.g., Willy v. Coastal Corp.*, 503 U.S. 131, 132 (1992); *Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197, 203 (1958); *Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48, 50 (1952); *Anderson v. Yungkao*, 329 U.S. 482, 483 (1947); *Mississippi Pub. Co. v. Murphree*, 326 U.S. 438, 440 (1946). Such a ground is

amplified where there is a "threat to the goal of uniformity of federal procedure posed by the decision below." *Hanna v. Plumer*, 380 U.S. 460, 463 (1965) (reviewing a decision applying divergent state service of process requirements).

Petitioners submit that just such a threat is posed by the Eleventh Circuit's application of state substantive contract law to a release of claims litigated in federal court, so as to categorically deny equitable relief for fraud on the court in an independent action preserved by Federal Rule of Civil Procedure 60(b). To allow substantive state law such broad categorical application to rights specifically preserved by the Federal Rules of Civil Procedure runs afoul of the Supremacy Clause, this Court's ruling in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), the clear language in FED. R. CIV. P. 60(b), and, finally, the federal courts' inherent right to protect the judiciary – and the public at large – from fraud.

This Petition thus concerns an issue anterior to that addressed recently by this Court in *United States v. Beggerly*, 118 S.Ct. 1862 (1998), where Chief Justice Rehnquist noted that independent actions under FED. R. CIV. P. 60(b) must "be reserved for those cases of 'injustices which, in certain instances, are deemed sufficiently gross to demand a departure' from rigid adherence to the doctrine of res judicata." Id. at 1867 (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944)). It appears that the Eleventh Circuit assumed, for purposes of its decision, that the conduct alleged in the Complaints did rise to the level of a fraud on the court, *see* 162 F.3d at 625;

App. at 9, and, indeed, Respondents' conduct had consistently been characterized in this way by other tribunals. *See In re E.I. DuPont De Nemours & Company – Benlate Litigation*, 99 F.3d at 369; App. at 98; *Kawamata Farms, Inc. v. United Agri Products*, 948 P.2d at 1097-99; App. at 204-09.[7] Likewise, this Petition does not raise the question of precisely what forms of relief are available through an independent action saved under FED. R. CIV. P. 60(b).[8] The issue here, rather, is whether the application of state substantive contract law can trump the equitable relief and protections from fraud recognized and preserved by FED. R. CIV. P. 60(b), *Hazel-Atlas Glass*, and its progeny.

2. In *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, Hartford and Hartford's attorneys perpetrated a fraud on the U.S. Patent and Trademark office (PTO) in support of a patent application in 1926, then sued Hazel-Atlas for patent infringement. After the district court dismissed the action, Hartford appealed. Hartford's appeal relied on the fraudulent article used to perpetrate the fraud on the PTO. In 1932, the judgment in favor of Hazel-Atlas was reversed, with a finding that Hartford was the holder of a

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[7] Because the Petitioners' Complaints were dismissed pursuant to a FED. R. CIV. P. 12(b)(6) motion, the Eleventh Circuit accepted that Petitioners had stated an independent claim for equitable relief for fraud on the court. *See* 162 F.3d at 623 n.2; App. at 5 n.2.

[8] The *Lay* Plaintiffs, in the 97-8914 matter, enumerated three forms of relief available through an independent action: (1) setting aside the judgment; (2) money damages; and (3) recission of the settlement agreement. *Lay*, First Amended Complaint, ¶¶ 259-67; App. at 75-77. The *Kobatake* Plaintiffs, in the 97-8899 matter, generally prayed for equitable relief. *Kobatake* Complaint, Prayer; App. at 85.

valid patent which Hazel-Atlas had infringed. Based on the strength of that judgment, the parties entered into a release and a settlement agreement with Hazel-Atlas paying the then-huge sum of $1,000,000 to Hartford. *Id.* at 251.

Twelve years after the judgment, the U.S. Supreme Court "devitalized" the judgment obtained by fraud on the court after the defrauded party, Hazel-Atlas, brought an independent action. The Supreme Court ignored the fraudfeasor's arguments that the parties' settlement agreement precluded relief based on fraud on the court.[9]

The *Hazel-Atlas Glass* ruling continued to recognize a federal court's equitable power to protect itself and its litigants, regardless of any settlement agreements, when a party and its lawyers perpetrate a fraud on the court. *Id.* at 244-51. Equitable relief against fraudulent judgments was "[c]reated to avert the evils of archaic rigidity," and "has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations." *Id.* at 248.

This Court's ruling in *Hazel-Atlas Glass* was confirmed in the 1946 Amendments to the Federal Rules of Civil Procedure. In relevant part, FED. R. CIV. P. 60(b)

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[9] *See* Pages 20-21, and 67-69 of the Hartford Empire Company's Brief to the United States Supreme Court from the Record On Appeal in *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238 (1944). App. at 240-44.

preserves "the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding . . . or to set aside a judgment for fraud on the court." FED. R. CIV. P. 60(b). The Federal Rules Advisory Committee expressly noted that an "illustration" of the application of this savings clause was presented in *Hazel-Atlas Glass*. *See* FED. R. CIV. P. 60(b), Advisory Committee Notes ¶ 7 (1946 Amendments).

3. The Eleventh Circuit's decision fatally undermines the availability of an independent action seeking equitable relief from a federal judgment procured by fraud on the court, an action recognized in this Court's jurisprudence and specifically saved by the Federal Rules of Civil Procedure. Although the opinion below ostensibly recognized Petitioners' claims of fraudulent acts by both du Pont and its counsel, Alston & Bird, it nevertheless held that: " . . . however egregiously defendants may have behaved during the prior litigation, Plaintiffs' execution of . . . an all-encompassing release prohibits them from suing defendants for that behavior." 162 F.3d at 625; App. at 9. Following the Eleventh Circuit's opinion to its logical conclusion, any time a party enters into a general release, application of substantive state contract law could deprive that party of any claim for fraud on the court or crimes in the judicial process used to gain the settlement.[10]

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[10] Under this reasoning, a litigant could bribe a judge, and thereby obtain a settlement from the unsuspecting other side with an "all-encompassing" release and, thereafter, be insulated from civil liability for his illegal and fraudulent acts.

The critical error made by the Eleventh Circuit was to apply state substantive contract law to categorically bar an independent action brought pursuant to FED. R. CIV. P. 60(b).[11] Hitherto, the federal courts have consistently FED. R. CIV. P. 60(b) ruled that the grounds for relief from federal judgments are entirely a matter of federal law, on which state law may be disregarded. *See Wiedemann v. Galiano*, 722 F.2d 335, 337 (7th Cir. 1983); *Johnson Chem. Co. v. Condado Center*, 453 F.2d 1044, 1045-47 (1st Cir. 1972); *Vassos v. Societa Trans-Oceanica Canopus, S.A.*, 272 F.2d 182, 183 (1959), *cert. denied*, 362 U.S. 935 (1960). The federal courts have prescribed the rules of decision for independent actions saved by FED. R. CIV. P. 60(b), including such equitable determinations as application of time bars, laches, and the "clean hands" doctrine. *See Robinson v. Volkswangenwerk AG*, 56 F.3d 1268, 1272-74 (10th Cir. 1995), *cert. denied*, 516 U.S. 1045 (1996); *Simons v. United States*, 452 F.2d 1110 (2d Cir. 1971).

No federal court that had previously ruled on independent actions involving equitable relief from consent decrees or judgments through settlement had ever applied state law in such a proceeding. *See South Mark Properties v. Charles House Corp.*, 742 F.2d 862, 873 (5th Cir. 1984); *May v. Moss*, 212 F.2d 400, 404-03 (8th Cir. 1954); *Ira S. Bushey & Sons, Inc. v. E.E. Hedges Transp. Corp.*, 167 F.2d 9 (2d Cir. 1948); *Lustgarten v. Felt*, 92 F.2d 277, 278-79 (3d Cir. 1937). This is no surprise, as this Court has made

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[11] Compare with *Matsuura v. Alston & Bird*, 166 F.2d 1006 (9th Cir. 1999) (construing virtually identical settlement agreement under Delaware contract law, but concluding that all causes of action were not barred).

emphatically clear that the equitable proceeding of bills of review (a form of writ that was consolidated by FED. R. CIV. P. 60(b) into the independent action saved in that Rule) were available to obtain equitable relief from decrees fraudulently procured through settlement, so long as there was an allegation of fraud on the court. *See Thompson v. Maxwell*, 95 U.S. 391, 397-98 (1877); *Swift & Co. v. United States*, 276 U.S. 311, 323 (1928).

Finally, the Eleventh Circuit's decision ostensibly challenges the principle that the Federal Rules of Civil Procedure, and not state law, controls the availability of actions in federal court. This was presumably settled by this Court's holding in *Hanna v. Plumer*, 380 U.S. 460, 463-65 (1965), and confirmed in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), where the Court noted that the Federal Rules are not "to be narrowly construed in order to avoid a 'direct collision' with state law. The Federal Rules should be given their plain meaning." Id. at 749 n.9. Petitioners would obviously submit that the plain meaning of FED. R. CIV. P. 60(b), preserving an independent *federal* equitable action for relief against fraudulently obtained *federal* judgments, is controlled by federal common law. Under the Federal Rules Enabling Act, 28 U.S.C. § 2072(b), inasmuch as FED. R. CIV. P. 60(b) preserves a federal equitable proceeding, it manifestly trumps the application of state law. Neither state procedural rules (such as statutes of limitations, as noted above), nor any state substantive law (such as a contract release, as in this case), would have any application to the relief preserved by FED. R. CIV. P. 60(b). *See Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-13 (1941).

4. It is apodictic that any doctrine that upholds the sanctity of oaths, that safeguards the administration of justice, and that preserves the public confidence and the purity and legitimacy of judicial proceedings must always prevail over a practice that undermines the integrity of the judicial process. As was noted by the *Hazel-Atlas Glass* Court:

> . . . [T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

322 U.S. at 244-45. Allowing application of substantive state contract law to settlement agreements or consent decrees could well eviscerate the right to equitable relief for fraud on the court, and would subject litigants in federal court to a bewildering array of conflicting interpretations of state law.

Nor does the Eleventh Circuit's mis-step appear to be an isolated occurrence. As already noted, a number of cases have raised the propriety of federal courts using state contract law as a means to deny independent actions seeking relief from judgments by settlement or consent decrees which were procured by fraud on the court.

Petitioners certainly do not suggest that the frequency of filings of independent actions for fraud on the court are likely to increase. But it is certainly consistent with a judicial policy to encourage settlements that a sure and certain, albeit limited, avenue for relief be available in the unlikely event that it is later discovered that a consent judgment was procured by fraud on the court.

The danger posed by the Eleventh Circuit's decision in this case is that this limited avenue for review will be constricted into a virtual dead-end. Application of substantive state contract law in these situations will result in fewer settlements because parties will be strategically negotiating to agree on magic language and an applicable law that will either eliminate or preserve a subsequent right of independent action to challenge the consent decree if a fraud upon the federal court is discovered later. Georgia's contract law (as here) may be a trap for the unwary settlor; Delaware's law (as in *Matsuura*) may be more gracious. Such lack of uniformity fundamentally undermines a significant aspect of the Federal Rules of Civil Procedure, and is contrary to Congress' intent in the Federal Rules Enabling Act. *See Hanna*, 380 U.S. at 463.

5. If review is granted here, Petitioners intend to argue that substantive state law is inapplicable to determine whether a party may initiate an independent action seeking relief from a consent decree (or judgment by settlement) procured by fraud. As already noted, this Petition does not ask the Court to further elucidate (as in *Beggerly*) what sorts of litigation conduct constitute a fraud on the court, and would thus qualify as grounds for an independent action saved under FED. R. CIV. P. 60(b). Nor does this Petition require the Court to rule on the

precise forms or modalities of equitable relief available against fraudulently obtained federal judgments. In the happy event that this Court grants review of this Petition, and subsequently reverses the Eleventh Circuit's decision, these matters would be addressed on remand by the district court.

CONCLUSION

Based upon the foregoing reasons, the writ of *certiorari* should be granted. In the alternative, the decision below should be summarily reversed and remanded.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

Page

Opinion issued by the United States Court of Appeals for the Eleventh Circuit, dated December 3, 1998 .....App. 1

Order issued by the Honorable Richard J. Freeman, dated July 17, 1997 .....App. 17

Order denying Petition For Rehearing and Suggestion For Rehearing *En Banc, Ellis W. Lay et al. v. E.I. du Pont de Nemours & Company et al.* and *Warren Kobatake et al. v. E.I. du Pont de Nemours & Company et al.*, dated January 29, 1999 ...App. 31

Petition For Rehearing and Suggestion for Rehearing *En Banc, Ellis W. Lay et al. v. E.I. du Pont de Nemours & Company et al.*, filed December 24, 1998 .....App. 33

Ellis W. Lay et al. v. E.I. du Pont de Nemours & Company et al., Complaint, filed September 6, 1996 .....App. 64

Ellis W. Lay et al. v. E.I. du Pont de Nemours & Company et al., First Amended Complaint, filed November 8, 1996 .....App. 72

Warren Kobatake et al. v. E.I. du Pont de Nemours & Company et al., Complaint, filed September 19, 1996 .....App. 81

In re E.I. DuPont De Nemours & Company – Benlate Litigation, 99 F.3d 363 (11th Cir. 1996).....App. 87

Kawamata Farms, Inc. v. United Agri Products, 86 Hawai'i 214, 948 P.2d 1055 (1997).....App. 109

TABLE OF CONTENTS – Continued

Page

Davis Tree Farms, Inc. v. E.I. du Pont de Nemours & Company et al., No. 92-20006 (CA 23) (Fla. Cir. Ct. Aug. 5, 1996), *vacated following settlement* August 6, 1996, available at <http://www.courttv.com/legaldocs/business/dupont.html>.....App. 220

Copies of Materials from the Record on Appeal from *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944) Containing Reference to a Release.....App. 239

Warren KOBATAKE; Pleasonton Corp., a Hawaii Corporation, et al., Plaintiffs-Appellants,

v.

E.I. DUPONT DE NEMOURS AND COMPANY; Alston & Bird, A Georgia Partnership Including Professional Corporations, Defendants-Appellees.
Ellis W. LAY, Individually and d.b.a. Wintergreen Nurseries; Prince Nurseries, Inc., a North Carolina corporation, et al., Plaintiffs-Appellants,

v.

E.I. DUPONT DE NEMOURS AND COMPANY, a Delaware corporation; Alston & Bird, a Georgia Partnership, Defendants-Appellees.

Nos. 97-8899, 97-8914.

United States Court of Appeals,
Eleventh Circuit.

Dec. 3, 1998.

Rehearing and Suggestion for Rehearing En Banc Denied Jan. 29, 1999.

Howard Glickstein, Judith A. Pavey, Honolulu, HI, for Kabatake [sic] and Pleasonton Corp.

Don C. Keenan, Atlanta, GA, for Plaintiffs-Appellants.

Stephen T. Cox, San Francisco, CA, Peter Molligan, David Moyer, John Hentschel, Chad McGowan, Atlanta, GA, for Saxby and Puna Certified.

John H. Fleming, John A. Chandler, Atlanta, GA, for Alston and Bird.

William H. Boice, James F. Bogan, A. Stephens Clay, Atlanta, GA, for E.I. DuPont De Nemours & Co.

Thomas A. Pendarvis, P. Benjamin Zuckerman, Anne D. Zuckerman, A. Camden Lewis, Mary G. Lewis, Columbia, SC, for Plaintiffs-Appellants in 97-8914.

Appeals from the United States District Court for the Northern District of Georgia.

Before TJOFLAT and DUBINA, Circuit Judges, and HILL, Senior Circuit Judge.

PER CURIAM:

The judgment in this case is affirmed for the reasons stated in the district court's thorough and well-reasoned order filed on July 18, 1997, and attached hereto as an appendix.

AFFIRMED.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Ellis Lay, individually and d/b/a/ Wintergreen Nurseries; Prince Nurseries, Inc.; James Oliver Prince, Jr.; Lynn Hayes, individually and d/b/a/ Lynn's Nurseries; Thomas O. Mahaffey, Jr. Greenhouse, Inc.; Thomas O. Mahaffey Jr.; and George S. Ferguson, individually and d/b/a/ Scrub Oak Foliage

v.

E.I. Dupont De Nemours and Company and Alston & Bird

Warren Kobatake, Pleasonton Corporation, Malcolm R. Saxby, and Puna Certified Nursery

v.

E.I. Dupont De Nemours and Company and Alston & Bird

Nos. 1:96-cv-2303-RCF, 1:96-cv-3417-RCF

ORDER

RICHARD C. FREEMAN, Senior District Judge:

These related actions are before the court on defendants' motions to dismiss the complaints in both litigations. The court addresses the actions together because defendants rely on the same legal theories in both cases to argue that the complaints do not state a claim upon which relief may be granted. In addition, plaintiffs rely on the same legal theories in both cases to counter defendants' argument.

BACKGROUND

Plaintiffs are nursery owners whose plants were allegedly damaged by Benlate 50DF, a product manufactured by defendant E.I. DuPont de Nemours and Company [DuPont]. Approximately five years ago, plaintiffs filed several products liability lawsuits against DuPont to recover the money lost from the damage to their plants.[1] The Kobatake plaintiffs proceeded to trial against DuPont and, while the jury was deliberating, settled the case. At the same time, the Lay plaintiffs also settled their action against DuPont. Pursuant to the terms of the settlement agreements, plaintiffs executed general releases, all of which provide, in relevant part:

> [Plaintiff] hereby now and fully, finally and forever, releases and discharges DuPont, [and] its . . . attorneys from any and all liability, claims, demands, damages or rights of action (hereinafter referred to as "claims") of any kind or character and of any nature whatsoever, whether known or unknown, fixed or contingent, arising from the beginning of time to the present, including but not limited to (1) any and all claims arising from or allegedly arising from or in any way related to [plaintiff's] use of Benlate or any Benomyl-containing fungicide; (2) any and all claims arising from or allegedly arising from or in any way related to Benlate or any Benomyl-containing fungicide or any constituents thereof, and (3) any and all claims which might have been alleged, or which were alleged, in the Civil Action.

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[1] Defendant Alston & Bird represented DuPont in the products liability litigation.

See, e.g., DuPont's Motion to Dismiss, Exhibit A. The releases also contain merger clauses, which provide that "[a]ll agreements and understandings between [plaintiff] and DuPont are embodied and expressed herein" and "[plaintiff] signs this Release as its own free act, without any promise, inducement, or representation not fully expressed herein." *Id.*

After settling with DuPont, plaintiffs discovered information that led them to believe that defendants acted improperly and fraudulently during the defense of the previous litigation by, *inter alia*, scheming to destroy harmful evidence and presenting perjured testimony. Plaintiffs subsequently filed these actions, alleging fraud, civil conspiracy, spoliation of evidence, violations of the Georgia Fair Business Practices Act, public nuisance, and racketeering. In addition, plaintiffs allege that they were fraudulently induced into settling the prior actions. Defendants seek dismissal of the pending actions on the grounds that the general releases prohibit plaintiffs from asserting their claims.[2]

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[2] Because defendants' motions are brought under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief may be granted, the court accepts the facts as pleaded in the complaint and construes them in the light most favorable to the plaintiff. *Parr v. Woodmen of The World Life Insurance Co.*, 791 F.2d 888, 889-90 (11th Cir.1986). Thus, defendants can succeed with their motion only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim." *Bracewell v. Nicholson Air Services, Inc.*, 680 F.2d 103, 104 (11th Cir.1982).

DISCUSSION

1. Collateral Estoppel

The parties first dispute whether defendants are collaterally estopped from arguing that the general releases bar plaintiffs' actions for fraud. Plaintiffs contend that the doctrine of collateral estoppel applies because defendants argued and lost this same point in the district court that presided over the products liability actions. *See In re E.I. du Pont de Nemours and Co.*, 918 F.Supp. 1524, 1551 (M.D.Ga.1995), *rev'd*, 99 F.3d 363 (11th Cir.1996), *petition for cert. filed*, 65 U.S.L.W. 3767 (U.S. May 8, 1997) (No. 96-1777).* This contention is without merit. The district court, in a lengthy opinion, made numerous factual and legal conclusions, including the determination that the general releases did not prevent the court from hearing plaintiffs' motion for contempt. The court then found DuPont in contempt and fined it in excess of $6 million. DuPont appealed, and, after determining the threshold issue of whether the district court had jurisdiction over the contempt proceeding, the Eleventh Circuit reversed and remanded the action. *See In re E.I. DuPont De Nemours and Co.*, 99 F.3d 363 (11th Cir.1996). This reversal and remand for further proceedings negates any conclusive effect that the district court's judgment might have had, and thus the doctrine of collateral estoppel is not applicable here. *See, e.g., Jaffree v. Wallace*, 837 F.2d 1461, 1466 (11th Cir.1988) ("A judgment that has been vacated, reversed, or set aside on appeal is thereby deprived of all conclusive effect, both as res judicata and as collateral

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* *cert. denied*, ___ U.S. ___, 118 S.Ct. 263, 139 L.Ed.2d 190 (1997).

estoppel."); 18 Wright, Miller, and Cooper, Federal Practice and Procedure § 4432 (1981) ("Reversal and remand for further proceedings on the entire case defeats preclusion entirely until a new final judgment is entered by the trial court or the initial judgment is restored by further appellate proceedings."). Accordingly, the court finds it appropriate to address defendants' argument that plaintiffs released all claims against them, including the claims that are raised in these actions.

2. Releases

As set forth above, plaintiffs discharged defendants from "any and all liability, claims, demands, damages or rights of action of any kind or character," "whether known or unknown," "arising from the beginning of time to the present," "including . . . any and all claims arising from or in any way related to [plaintiffs'] use of Benlate" when they executed the releases in exchange for a substantial amount of money. At the same time, plaintiffs also agreed that the releases represented the parties' entire agreement and would be governed by Georgia law.[3]

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[3] The court declines plaintiffs' invitation to apply federal common law to the actions at bar. As stated by the Supreme Court, "absent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 101 S.Ct. 2061, 2067, 68 L.Ed.2d 500 (1981). None of these areas is implicated here.

Plaintiffs first argue that the releases do not encompass the claims alleged in the actions at bar. The court cannot agree. Under Georgia law, "[a] release or settlement agreement is a contract subject to construction by the court." *Darby v. Mathis*, 212 Ga.App. 444, 441 S.E.2d 905, 906 (Ga.App.1994). Nonetheless, "no construction of the contract is . . . permissible when the language employed by the parties in the contract is plain, unambiguous and capable of only one reasonable interpretation." *Sakas v. Jessee*, 202 Ga.App. 838, 415 S.E.2d 670 (Ga.App.1992). Here, the releases could not be more plain; plaintiffs gave up all rights to seek damages from defendants in connection with their use of DuPont's Benlate product and agreed that the release represented the parties' entire agreement.[4] When "[a] contract provides plainly that it was the intent of the parties to settle and effect a resolution of all claims and disputes of every kind and nature among them . . . ; that it is the entire agreement of the parties; and that they released and waived all claims against each other of any kind whether known or unknown, . . . [n]o grounds at law or in the contract itself

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[4] Although plaintiffs explain that it was not their intention to release the claims alleged in these actions, the court is prohibited from taking this explanation into account where, as here, the releases are plain and unambiguous. *See, e.g., Leventhal v. Seiter*, 208 Ga.App. 158, 430 S.E.2d 378, 382 (Ga.App.1993) ("parol evidence is inadmissible to challenge the unambiguous terms of the contract"); *cf. Sakas*, 202 Ga.App. 838, 415 S.E.2d at 673 ("Whatever appellants might wish they had said in the [contract], they did not say it, and what they did say is unambiguous; it cannot be made ambiguous by the mere assertion that it was meant to include other matters which it did not mention.").

exist to open [it] to jury examination." *Sakas*, 415 S.E.2d at 673. Thus, however egregiously defendants may have behaved during the prior litigation, plaintiffs' execution of such all-encompassing releases prohibits them from suing defendants for that behavior.[5]

However, because plaintiffs have alleged that they were fraudulently induced to execute the releases, the releases are voidable. *See, e.g., Gibbs v. Jefferson-Pilot Fire & Casualty Ins. Co.*, 178 Ga.App. 544, 343 S.E.2d 758, 759 (Ga.App.1986) ("Fraud in the procurement of a release will render it voidable."). In such a situation, plaintiffs have an election of remedies; they may (1) rescind the contract, thereby restoring to defendants the benefits they received as a result of the settlement, and sue in tort for damages resulting from the alleged fraud or (2) affirm the contract, thereby retaining the benefits received under the contract, and sue for damages. *See, e.g., Ben Farmer Realty Co. v. Woodard*, 212 Ga.App. 74, 441 S.E.2d 421, 422

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[5] It is of no consequence that plaintiffs were unaware of defendants' allegedly fraudulent conduct at the time they executed the releases. *In U.S. Anchor Manufacturing, Inc. v. Rule Industries, Inc.*, 264 Ga. 295, 443 S.E.2d 833 (Ga.1994), the Georgia Supreme Court addressed the question of whether a general release discharges liability for injury caused by already committed tortious conduct that was unknown to the releasing party at the time the release was executed and determined that "a party may . . . discharge liability for injury caused by unknown tortious conduct" when such intention is "clearly expressed." 264 Ga. 295, 443 S.E.2d at 835. As discussed above, the releases at issue here clearly express the parties' intentions to discharge liability for unknown conduct. Thus, plaintiffs may not avoid the unambiguous terms of the releases on the grounds that they were unaware of the facts forming the basis for their complaints in these actions.

(Ga.App.1994) (explaining that a party "claiming to have been fraudulently induced into entering a . . . contract has an election of remedies involving rescission or affirmation of the contract"); *Carpenter v. Curtis*, 196 Ga.App. 234, 395 S.E.2d 653, 655 (Ga.App.1990) ("Two actions are available to one who was fraudulently induced by misrepresentations into entering a contract: he can affirm the contract and sue for breach or seek to rescind and sue in tort for fraud and deceit."). Of course, if a party elects to affirm the contract, he or she is bound by its provisions. *Orion Capital Partners, L.P. v. Westinghouse Electric Corp.*, 223 Ga.App. 539, 478 S.E.2d 382, 385 (Ga.App.1996). Rescission, on the other hand, relieves the party from any adverse consequences dictated by the terms of the contract. *Id.*

As mentioned previously, the releases at issue here contain merger clauses. Defendants, asserting that plaintiffs have affirmed the settlement agreements by retaining the money paid to them under those agreements, argue that the merger clauses prohibit plaintiffs from voiding the releases on the grounds that plaintiffs were fraudulently induced into executing them. Plaintiffs, on the other hand, contend that the merger clauses are without any force and effect because defendants breached a duty to disclose information that either would have prevented them from entering into the releases or would have enabled them to settle for a greater amount of money. In the alternative, plaintiffs argue that they are entitled to rescission of the releases.

a. Affirmance

Assuming first that plaintiffs have affirmed the releases,[6] the court agrees with defendants that the merger clauses prevent plaintiffs from voiding them on the basis of fraud. Where, as here, a contract contains an entire agreement clause, "that clause operates as a disclaimer, establishing that the written contract completely and comprehensively represents all of the parties' agreement" and thus "bars [plaintiffs] from asserting reliance on the alleged misrepresentation not contained within the contract." *Pennington v. Braxley*, 224 Ga.App. 344, 480 S.E.2d 357, 359 (Ga.App.1997).[7] As explained by another court, "[t]his result obtains because where the allegedly defrauded party affirms a contract which contains a merger or disclaimer provision and retains the benefits, he is estopped from asserting that he has relied upon the other party's misrepresentation and his action for fraud must fail." *American Demolition, Inc. v. Hapeville Hotel Ltd. Partnership*, 202 Ga.App. 107, 413 S.E.2d 749, 751 (Ga.App.1991).

In these cases, plaintiffs seek to void the releases on the grounds that defendants did not disclose information relevant to plaintiffs' decision to settle their products liability claims. Plaintiffs did not, however, execute releases that contained a representation that they were

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[6] As will be explained below, the court finds that, having accepted and retained the money paid to them in exchange for the releases after having discovered the alleged fraud, plaintiffs have affirmed the releases.

[7] Reliance is, of course, an element essential to establishing fraud. *Id.*

relying on information provided to them by defendants. Instead, plaintiffs, with the aide of their attorneys, negotiated releases that specifically provided that they were executing the document "as [their] own free act, without any promise, inducement, or representation not fully expressed herein." Nothing in the releases indicates that plaintiffs were induced to settle by anything other than the settlement amount.

Attempting to avoid the plain language of the releases, plaintiffs argue that the merger clauses do not apply because defendants prevented them from exercising their own independent judgment when making the contract. Specifically, plaintiffs argue that defendants were obligated to inform them of the information that would have caused them to reevaluate the settlements. A similar argument was rejected by the Georgia Court of Appeals in the American Demolition case. There, the court determined that "[t]here was no evidence to suggest that this transaction was anything other than an arm's length transaction between two professionals and there is no evidence that any special or confidential relationship existed to give rise to a duty to disclose." 202 Ga.App. 107, 413 S.E.2d at 751-52. Similarly, plaintiffs here have not alleged that the transaction effectuating the settlement was not an arm's length transaction or that a relationship existed between them and defendants that would give rise to a duty to disclose. Indeed, the settlements were the product of the parties' attorneys' negotiations, which took place near the end of extremely contentious litigation.[8]

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[8] Plaintiffs do assert that defendants were under a duty to disclose because a court order existed in the products liability

Because the releases contain valid merger clauses, and assuming the releases were affirmed, plaintiffs cannot void the releases on the basis that they were fraudulently induced into executing them.

b. Rescission

Plaintiffs, perhaps anticipating the court's conclusion that the merger clauses operate to bar their claims of fraudulent inducement, have argued in the alternative that the releases may be rescinded. As mentioned above, rescission relieves plaintiffs of the terms of the release. Thus, if the releases are rescinded, the merger clauses are without effect.

"A contract may be rescinded at the instance of the party defrauded; but, in order to rescind, the defrauded party must promptly, upon discovery of the fraud, restore or offer to restore to the other party whatever he has received by virtue of the contract if it is of any value." O.C.G.A. § 13-4-60. However, a party "need not tender back what he is entitled to keep, and need not offer to

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action that directed them to produce the relevant information. The fact that defendants failed to meet a discovery obligation does not, however, give rise to an obligation to disclose that same information during the course of settlement negotiations. However inequitable a settlement may appear in hindsight, plaintiffs read and understood the language of the document they were signing and cannot now seek to renegotiate the terms of that document. *See, e.g., Driscoll v. Schuttler*, 697 F.Supp. 1195, 1203 (N.D.Ga.1988) ("Plaintiffs were not precluded from reading the releases; they understood that they were releasing their claims and exercised that option rather than gambling on the legal outcome of [their action].").

restore where the defrauding party has made restoration impossible, or when to do so would be unreasonable." *Crews v. Cisco Brothers Ford-Mercury, Inc.*, 201 Ga.App. 589, 411 S.E.2d 518, 519 (Ga.App.1991). Because "[t]he tender rule is that neither party may retain an unfair advantage," courts are directed to take a "flexible and pragmatic approach . . . toward the tender requirement." *Remediation Services, Inc. v. Georgia-Pacific Corp.*, 209 Ga.App. 427, 433 S.E.2d 631, 636 (Ga.App.1993). The ultimate goal is to return the parties "as nearly as possible to the status quo ante." *Corbitt v. Harris*, 182 Ga.App. 81, 354 S.E.2d 637, 639 (Ga.App.1987).

Here, it is undisputed that plaintiffs have neither offered to return nor actually returned the money they received in consideration for the releases. Plaintiffs argue that they were not required to tender for two reasons: (1) because the amounts of money they received pursuant to settlement are less than the amounts to which they are entitled; and (2) because defendants concealed the alleged fraud until after the money plaintiff's received in settlement were spent. The court cannot agree. First, if the releases are rescinded and the parties are returned to their pre-settlement positions, plaintiffs are entitled to nothing. Second, the court finds, as a matter of law, that it is not defendants who have made restoration impossible. Although plaintiffs are not in a position to restore the money received in settlement,[9] the position in which

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[9] Plaintiffs allege that the money was spent in an effort to contain the damages caused by DuPont's product.

plaintiffs find themselves is purely a result of discretionary decisions taken by them upon receipt of their settlement amounts.

Because plaintiffs cannot, as a matter of law, demonstrate that they are excepted from the requirement to restore the benefits received under the disputed contract, the court finds that they have affirmed the contract. This finding is in keeping with the general rule that "[a]ccepting and retaining the benefits under the contract alleged to be fraudulent after discovering the alleged fraud constitutes an affirmance." *Garcia v. Charles Evans BMW, Inc.*, 222 Ga.App. 121, 473 S.E.2d 588, 589 (Ga.App.1996). *See also Leathers v. Robert Potamkin Cadillac Corp.*, 184 Ga.App. 430, 361 S.E.2d 845, 846 (Ga.App.1987) ("It is well established that one who, for a valuable consideration, including payment of money, has released another from all further liability, cannot obtain a rescission of such a contract of release . . . without first restoring or offering to restore what the releasee paid for such release.").[10] And as explained above, affirmation of the contract leads to the ineluctable conclusion that the claims raised by plaintiffs in these actions are barred by the releases.

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[10] The court notes that plaintiffs may not now seek to tender the money received in settlement. Georgia law requires that rescission be timely. Plaintiffs learned of the alleged fraud in 1994, nearly two years prior to commencing these actions. This delay is, as a matter of law, determinative. *See, e.g., Orion Capital Partners*, 223 Ga.App. 539, 478 S.E.2d at 385 (holding that seven-month delay "is too late as a matter of law to constitute an effective rescission or reasonable offer to rescind the agreement").

CONCLUSION

Accordingly, for the reasons explained in the body of this Order, defendants' motions to dismiss [# 9-1, # 10-1, # 16-1 in Case No. 1:96-cv-2303-RCF and # 42-1 in Case No. 1:96-cv-3417-RCF] are GRANTED. The Clerk is DIRECTED to DISMISS these actions and CLOSE the FILES. The Clerk is also DIRECTED to TERMINATE all remaining motions in both actions.

SO ORDERED, this 17 day of July, 1997.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ELLIS LAY, individually and d/b/a WINTERGREEN NURSERIES: PRINCE NURSERIES, INC.; JAMES OLVIER PRINCE, Jr.; LYNN HAYES, individually and d/b/a LYNN'S NURSERIES; THOMAS O. MAHAFFEY, JR. GREENHOUSE, INC; THOMAS O. MAHAFFEY Jr.; and GEORGE S. FERGUSON, individually and d/b/a SCRUB OAK FOLIAGE	: 1:96-cv-2303-RCF
vs.	
E. I. DUPONT DE NEMOURS AND COMPANY and ALSTON & BIRD	
WARREN KOBATAKE, PLEASONTON CORPORATION, MALCOLM R. SAXBY and PUNA CERTIFIED NURSERY	: 1:96-cv-3417-RCF
vs.	
E. I. DUPONT DE NEMOURS AND COMPANY and ALSTON & BIRD	

ORDER

(Filed Jul. 13, 1997)

These related actions are before the court on defendants' motions to dismiss the complaints in both litigations. The court addresses the actions together because

defendants rely on the same legal theories in both cases to argue that the complaints do not state a claim upon which relief may be granted. In addition, plaintiffs rely on the same legal theories in both cases to counter defendants' argument.

BACKGROUND

Plaintiffs are nursery owners whose plants were allegedly damaged by Benlate 50DF, a product manufactured by defendant E.I. DuPont de Nemours and Company [DuPont]. Approximately five years ago, plaintiffs filed several products liability lawsuits against DuPont to recover the money lost from the damage to their plants.[1] The Kobatake plaintiffs proceeded to trial against DuPont and, while the jury was deliberating, settled the case. At the same time, the Lay plaintiffs also settled their action against DuPont. Pursuant to the terms of the settlement agreements, plaintiffs executed general releases, all of which provide, in relevant part:

> [Plaintiff] hereby now and fully, finally and forever, releases and discharges DuPont, [and] its . . . attorneys from any and all liability, claims, demands, damages or rights of action (hereinafter referred to as "claims") of any kind or character and of any nature whatsoever, whether known or unknown, fixed or contingent, arising from the beginning of time to the present, including but not limited to (1) any and all claims arising from or allegedly arising from

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[1] Defendant Alston & Bird represented DuPont in the products liability litigation.

> or in any way related to [plaintiff's] use of Benlate or any Benomyl-containing fungicide; (2) any and all claims arising from or allegedly arising from or in any way related to Benlate or any benomyl-containing fungicide or any constituents thereof, and (3) any and all claims which might have been alleged, or which were alleged, in the Civil Action.

See, e.g., DuPont's Motion to Dismiss, Exhibit A. The releases also contain merger clauses, which provide that "[a]ll agreements and understandings between [plaintiff] and DuPont are embodied and expressed herein" and "[plaintiff] signs this Release as its own free act, without any promise, inducement, or representation not fully expressed herein." *Id.*

After settling with DuPont, plaintiffs discovered information that led them to believe that defendants acted improperly and fraudulently during the defense of the previous litigation by, *inter alia*, scheming to destroy harmful evidence and presenting perjured testimony. Plaintiffs subsequently filed these actions, alleging fraud, civil conspiracy, spoliation of evidence, violations of the Georgia Fair Business Practices Act, public nuisance, and racketeering. In addition, plaintiffs allege that they were fraudulently induced into settling the prior actions. Defendants seek dismissal of the pending actions on the grounds that the general releases prohibit plaintiffs from asserting their claims.[2]

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[2] Because defendants' motions are brought under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted, the court accepts the facts as pleaded in the complaint and construes them in the light most favorable to the

DISCUSSION

1. Collateral Estoppel

The parties first dispute whether defendants are collaterally estopped from arguing that the general releases bar plaintiffs' actions for fraud. Plaintiffs contend that the doctrine of collateral estoppel applies because defendants argued and lost this same point in the district court that presided over the products liability actions. *See In re E.I. DuPont de Nemours and Co.*, 918 F. Supp. 1524, 1551 (M.D. Ga. 1995), *rev'd*, 99 F.3d 363 (11th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3767 (U.S. May 8, 1997) (No. 96-1777). This contention is without merit. The district court, in a lengthy opinion, made numerous factual and legal conclusions, including the determination that the general releases did not prevent the court from hearing plaintiffs' motion for contempt. The court then found DuPont in contempt and fined it in excess of $6 million. DuPont appealed, and, after determining the threshold issue of whether the district court had jurisdiction over the contempt proceeding. The Eleventh Circuit reversed and remanded the action. *See In re E.I. DuPont de Nemours and Co.*, 99 F.3d 363 (11th Cir. 1996). This reversal and remand for further proceedings negates any conclusive effect that the district court's judgment might have had, and thus the doctrine of collateral estoppel is not applicable here. *See, e.g., Jaffree v. Wallace*, 837 F.2d 1461, 1466

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plaintiff. *Parr v. Woodmen of The World Life Insurance Co.*, 791 F.2d 888, 889-90 (11th Cir. 1986). Thus, defendants can succeed with their motion only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim" *Bracewell v. Nicholson Air Services, Inc.*, 680 F.2d 103, 104 (11th Cir. 1982).

(11th Cir. 1988) ("A judgment that has been vacated, reversed, or set aside on appeal is thereby deprived of all conclusive effect, both as res judicata and as collateral estoppel."); 18 Wright, Miller, and Cooper. Federal Practice and Procedure § 4432 (1981) ("Reversal and remand for further proceedings on the entire case defeats preclusion entirely until a new final judgment is entered by the trial court or the initial judgment is restored by further appellate proceedings."). Accordingly, the court finds it appropriate to address defendants' argument that plaintiffs released all claims against them, including the claims that are raised in these actions.

2. Releases

As set forth above, plaintiffs discharged defendants from "any and all liability, claims, demands, damages or rights of action of any kind or character," "whether known or unknown," "arising from the beginning of time to the present," "including . . . any and all claims arising from or in any way related to [plaintiffs'] use of Benlate" when they executed the releases in exchange for a substantial amount of money. At the same time, plaintiffs also agreed that the releases represented the parties' entire agreement and would be governed by Georgia law.[3]

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[3] The court declines plaintiffs' invitation to apply federal common law to the actions at bar. As stated by the Supreme Court, "absent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international

Plaintiffs first argue that the releases do not encompass the claims alleged in the actions at bar. The court cannot agree. Under Georgia law, "[a] release or settlement agreement is a contract subject to construction by the court." *Darby v. Mathis*, 441 S.E.2d 905, 906 (Ga. App. 1994). Nonetheless, "no construction of the contract is . . . permissible when the language employed by the parties in the contract is plain, unambiguous and capable of only one reasonable interpretation." *Sakas v. Jessee*, 415 S.E.2d 670 (Ga. App. 1992). Here, the releases could not be more plain; plaintiffs gave up all rights to seek damages from defendants in connection with their use of DuPont's Benlate product and agreed that the release represented the parties' entire agreement.[4] When "[a] contract provides plainly that it was the intent of the parties to settle and effect a resolution of all claims and disputes of every kind and nature among them . . . ; that it is the entire agreement of the parties; and that they released and waived all claims against each other of any

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disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." *Texas Industries Inc. v. Radcliff Materials, Inc.*, 101 S. Ct. 2061, 2067 (1981). None of these areas is implicated here.

[4] Although Plaintiffs explain that it was not their intention to release the claims alleged in these actions, the court is prohibited from taking this explanation into account where, as here, the releases are plain and unambiguous. *See, e.g., Leventhal v. Seiter*, 430 S.E.2d 378, 382 (Ga. App. 1993) ("parol evidence is inadmissible to challenge the unambiguous terms of the contract"); *Cf. Sakas*, 415 S.E.2d at 673 ("Whatever appellants might wish they had said in the [contract], they did not say it, and what they did say is unambiguous; it cannot be made ambiguous by the mere assertion that it was meant to include other matters which it did not mention."

kind whether known or unknown, . . . [n]o grounds at law or in the contract itself exist to open [it] to jury examination." *Sakas*, 415 S.E.2d at 673. Thus, however egregiously defendants may have behaved during the prior litigation, plaintiffs' execution of such all-encompassing releases prohibits them from suing defendants for that behavior.[5]

However, because plaintiffs have alleged that they were fraudulently induced to execute the releases, the releases are voidable. *See, e.g., Gibbs v. Jefferson-Pilot Fire & Casualty Ins. Co.*, 343 S.E.2d 758, 759 (Ga. App. 1986) ("Fraud in the procurement of a release will render it voidable."). In such a situation, plaintiffs have an election of remedies: they may (1) rescind the contract, thereby restoring to defendants the benefits they received as a result of the settlement, and sue in tort for damages resulting from the alleged fraud or (2) affirm the contract,

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[5] It is of no consequence that plaintiffs were unaware of defendants' allegedly fraudulent conduct at the time they executed the releases. In *Anchor Manufacturing, Inc. v. Rule Industries, Inc.*, 443 S.E.2d 833 (Ga. 1994), the Georgia Supreme Court addressed the question of whether a general release discharges liability for injury caused by already committed tortious conduct that was unknown to the releasing party at the time the release was executed and determined that "a party may . . . discharge liability for injury caused by unknown tortious conduct" when such intention is "clearly expressed." 443 S.E.2d at 835. As discussed above, the releases at issue here clearly express the parties' intentions to discharge liability for unknown conduct. Thus, plaintiffs may not avoid the unambiguous terms of the releases on the grounds that they were unaware of the facts forming the basis for their complaints in these actions.

thereby retaining the benefits received under the contract, and sue for damages. *See e.g., Ben Farmer Realty Co. v. Woodard*, 441 S.E.2d 421, 422 (Ga. App. 1994) (explaining that a party "claiming to have been fraudulently induced into entering a . . . contract has an election of remedies involving rescission or affirmation of the contract"); *Carpenter v. Curtis*, 395 S.E.2d 653, 655 (Ga. App. 1990) ("Two actions are available to one who was fraudulently induced by misrepresentations into entering a contract; he can affirm the contract and sue for breach or seek to rescind and sue in tort for fraud and deceit."). Of course, if a party elects to affirm the contract, he or she is bound by its provisions. *Orion Capital Partners L.P. v. Westinghouse Electric Corp.*, 478 S.E.2d 382, 385 (Ga. App. 1996). Rescission, on the other hand, relieves the party from any adverse consequences dictated by the terms of the contract. *Id.*

As mentioned previously, the releases at issue here contain merger clauses. Defendants, asserting that plaintiffs have affirmed the settlement agreements by retaining the money paid to them under those agreements, argue that the merger clauses prohibit plaintiffs from voiding the releases on the grounds that plaintiffs were fraudulently induced into executing them. Plaintiffs, on the other hand, contend that the merger clauses are without any force and effect because defendants breached a duty to disclose information that either would have prevented them from entering into the releases or would have enabled them to settle for a greater amount of money. In the alternative, plaintiffs argue that they are entitled to rescission of the releases.

a. Affirmance

Assuming first that plaintiffs have affirmed the releases,[6] the court agrees with defendants that the merger clauses prevent plaintiffs from voiding them on the basis of fraud. Where, as here, a contract contains an entire agreement clause, "that clause operates as a disclaimer, establishing that the written contract completely and comprehensively represents all of the parties' agreement" and thus "bars [plaintiffs] from asserting reliance on the alleged misrepresentation not contained within the contract." *Pennington v. Braxley*, 480 S.E.2d 357, 359 (Ga. App. 1997).[7] As explained by another court, "[t]his result obtains because where the allegedly defrauded party affirms a contract which contains a merger or disclaimer provision and retains the benefits, he is estopped from asserting that he has relied upon the other party's misrepresentation and his action for fraud must fail." *American Demolition, Inc. v. Hapeville Hotel Ltd. Partnership*, 413 S.E.2d 749, 751 (Ga. App. 1991).

In these cases, plaintiffs seek to void the releases on the grounds that defendants did not disclose information relevant to plaintiffs' decision to settle their products liability claims. Plaintiffs did not, however, execute releases that contained a representation that they were relying on information provided to them by defendants.

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[6] As will be explained below, the court finds that, having accepted and retained the money paid to them in exchange for the releases after having discovered the alleged fraud, plaintiffs have affirmed the releases.

[7] Reliance is, of course, an element essential to establishing fraud. *Id.*

Instead, plaintiffs, with the aide of their attorneys, negotiated releases that specifically provided that they were executing the document "as [their] own free act, without any promise, inducement, or representation not fully expressed herein." Nothing in the releases indicates that plaintiffs were induced to settle by anything other than the settlement amount.

Attempting to avoid the plan language of the releases, plaintiffs argue that the merger clauses do not apply because defendants prevented them from exercising their own independent judgment when making the contract. Specifically, plaintiffs argue that defendants were obligated to inform them of the information that would have caused them to reevaluate the settlements. A similar argument was rejected by the Georgia Court of Appeals in the *American Demolition* case. There, the court determined that "[t]here was no evidence to suggest that this transaction was anything other than an arm's length transaction between two professionals and there is no evidence that any special or confidential relationship existed to give rise to a duty to disclose." 413 S.E.2d at 751-52. Similarly, plaintiffs here have not alleged that the transaction on effectuating the settlement was not an arm's length transaction or that a relationship existed between them and defendants that would give rise to a duty to disclose. Indeed, the settlements were the product of the parties' attorneys' negotiations, which took place near the end of extremely contentious litigation.[8]

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[8] Plaintiffs do assert that defendants were under a duty to disclose because a court order existed in the products liability action that directed them to produce the relevant information.

Because the releases contain valid merger clauses, and assuming the releases were affirmed, plaintiffs cannot void the releases on the basis that they were fraudulently induced into executing them.

b. Rescission

Plaintiffs, perhaps anticipating the court's conclusion that the merger clauses operate to bar their claims of fraudulent inducement, have argued in the alternative that the releases may be rescinded. As mentioned above, rescission relieves plaintiffs of the terms of the release. Thus, if the releases are rescinded, the merger clauses are without effect.

"A contract may be rescinded at the instance of the party defrauded; but, in order to rescind, the defrauded party must promptly, upon discovery of the fraud, restore or offer to restore to the other party whatever he has received by virtue of the contract if it is of any value." O.C.G.A. § 13-4-60. However, a party "need not tender back what he is entitled to keep, and need not offer to

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The fact that defendants failed to meet a discovery obligation does not, however, give rise to an obligation to disclose that same information during the course of settlement negotiations. However inequitable a settlement may appear in hindsight, plaintiffs read and understood the language of the document they were signing and cannot now seek to renegotiate the terms of that document. *See, e.g., Driscoll v. Schuttler,* 697 F. Supp. 1195, 1203 (N.D. Ga. 1988) ("Plaintiffs were not precluded from reading the releases, they understood that they were releasing their claims and exercised that option rather than gambling on the legal outcome of [their action].")

restore where the defrauding party has made restoration impossible, or when to do so would be unreasonable." *Crews v. Cisco Brothers Ford-Mercury, Inc.*, 411 S.E.2d 518, 519 (Ga. App. 1991). Because "[t]he tender rule is that neither party may retain an unfair advantage," courts are directed to take a "flexible and pragmatic approach . . . toward the tender requirement." *Remediation Service, Inc. v. Georgia-Pacific Corp.*, 433 S.E.2d 631, 636 (Ga. App. 1993). The ultimate goal is to return the parties "as nearly as possible to the *status quo ante*." *Corbitt v. Harris*, 354 S.E.2d 637, 639 (Ga. App. 1987).

Here, it is undisputed that plaintiffs have neither offered to return nor actually returned the money they received in consideration for the releases. Plaintiffs argue that they were not required to tender for two reasons: (1) because the amounts of money they received pursuant to settlement are less than the amounts to which they are entitled; and (2) because defendants concealed the alleged fraud until after the money plaintiffs received in settlement were spent. The court cannot agree. First, if the releases are rescinded and the parties are returned to their pre-settlement positions, plaintiffs are entitled to nothing. Second, the court finds, as a matter of law, that it is not defendants who have made restoration impossible. Although plaintiffs are not in a position to restore the money received in settlement,[9] the position in which plaintiffs find themselves is purely a result of discretionary decisions taken by them upon receipt of their settlement amounts.

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[9] Plaintiffs allege that the money was spent in an effort to contain the damages caused by DuPont's product.

Because plaintiffs cannot, as a matter of law, demonstrate that they are excepted from the requirement to restore the benefits received under the disputed contract, the court finds that they have affirmed the contract. This finding is in keeping with the general rule that "[a]ccepting and retaining the benefits under the contract alleged to be fraudulent after discovering the alleged fraud constitutes an affirmance." *Garcia v. Charles Evans BMW, Inc.*, 473 S.E.2d 588, 589 (Ga. App. 1996). *See also Leathers v. Robert Potamkin Cadillac Corp.*, 361 S.E.2d 845, 846 (Ga. App. 1987) ("It is well established that one who, for a valuable consideration, including payment of money, has released another from all further liability, cannot obtain a rescission of such a contract of release . . . without first restoring or offering to restore what the release paid for such release.").[10] And as explained above, affirmation of the contract leads to the ineluctable conclusion that the claims raised by plaintiffs in these actions are barred by the releases.

CONCLUSION

Accordingly, for the reasons explained in the body of this Order defendants' motions to dismiss [#9-1, #10-1, #16-1 in Case No. 1:96-cv-2303-RCF and 42-1 in Case No.

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[10] The court notes that plaintiffs may not now seek to tender the money received in settlement Georgia law requires that rescission be timely. Plaintiffs learned of the alleged fraud in 1994, nearly two years prior to commencing these actions. This delay is, as a matter of law, determinative. *See, e.g., Orion Capital Partners*, 478 S.E.2d at 385 (holding that seven-month delay "is too late as a matter of law to constitute an effective rescission or reasonable offer to rescind the agreement").

1:96-cv-3417-RCF] are GRANTED. The Clerk is DIRECTED to DISMISS these actions and CLOSE the FILES. The Clerk is also DIRECTED to TERMINATE all remaining motions in both actions.

SO ORDERED, this 17 day of July, 1997.

/s/ Richard C. Freeman
RICHARD C. FREEMAN
SENIOR UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-8899

WARREN KOBATAKE;
PLEASONTON, CORP., a Hawaii Corporation, et al.,

Plaintiffs-Appellants,

versus

E.I. DUPONT DE NEMOURS AND COMPANY;
ALSTON & BIRD, A Georgia Partnership Including Professional Corporations,

Defendants-Appellees.

No. 97-8914

ELLIS W. LAY, Individually and d.b.a. Wintergreen Nurseries; PRINCE NURSERIES, INC., a North Carolina Corporation, et al.,

Plaintiffs-Appellants,

versus

E.I. DUPONT DENEMOURS [sic] AND COMPANY, a Delaware corporation,
ALSTON & BIRD, a Georgia partnership,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ___ F.2d ___).

Before: TJOFLAT and DUBINA, Circuit Judges and HILL, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGES

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Docket Nos. 97-8914 and 97-8899

ELLIS W. LAY, individually and d/b/a WINTERGREEN NURSERIES; PRINCE NURSERIES, INC., a North Carolina corporation; JAMES OLIVER PRINCE, JR.; JAMES OLIVER PRINCE, SR.; LYNN HAYES, individually and d/b/a LYNN'S NURSERIES; THOMAS O. MAHAFFEY, JR. GREENHOUSE, INC., a Florida corporation; THOMAS O. MAHAFFEY, JR.; and GEORGE S. FERGUSON and JACQUELINE D. FERGUSON, individually and d/b/a SCRUB OAK FOLIAGE; PLANTS, INC. a Texas corporation; HUNTSVILLE GREENHOUSE CORPORATION, a Texas corporation; MURPHY PROPERTIES, a Texas General Partnership; FLETCHER C. MURPHY, JR., Individually; and MARTHA C. MURPHY, individually,

Plaintiffs/Appellants,

v.

E.I. du Pont De NEMOURS AND COMPANY, a Delaware corporation; and ALSTON & BIRD, a Georgia Partnership,

Defendants/Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

SUGGESTION OF REHEARING EN BANC

A. Camden Lewis (S.C. Bar No. 3298)
Thomas A. Pendarvis
(GA Bar No. 577110)
LEWIS, BABCOCK & HAWKINS, L.L.P.
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Columbia, South Carolina 29201
(803) 771-8000
Attorneys for Appellants

December 23, 1998

Docket Nos. 97-8914 and 97-8899

Ellis W. Lay, et. al. v. E. I. du Pont, et. al.

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1-1, the undersigned counsel respectfully submits this Certificate of Interested Persons. The undersigned counsel certify that the following is a full and complete list of all parties in this action:

U.S. District Judge:	The Honorable Richard C. Freeman, Northern District of Georgia
Plaintiffs/Appellants:	Ellis W. Lay, individually and d/b/a Wintergreen Nurseries Prince Nurseries, Inc., a North Carolina Corporation James Oliver Prince, Jr. James Oliver Prince, Sr. Lynn Hayes, individually and d/b/a Lynn's Nurseries Thomas O. Mahaffey, Jr. Greenhouse, Inc., a Florida Corporation Thomas O. Mahaffey, Jr. George S. Ferguson, individually and

d/b/a Scrub Oak Foliage Jacqueline D. Ferguson, individually and d/b/a Scrub Oak Foliage Plants, Inc., a Texas Corporation Huntsville Greenhouse Corporation, a Texas Corporation Murphy Properties, a Texas General Partnership Fletcher C. Murphy, Jr. Martha C. Murphy

Defendant/Appellees: E. I. Du Pont de Nemours and Company, a Delaware Corp. Alston & Bird, A Georgia Partnership

The undersigned further certifies that the following is a full and complete list of all other persons, firms, partnerships or corporations (including those related to a party as subsidiary, conglomerate, affiliate or parent corporation) having either a financial interest which would be substantially affected by the outcome of this particular case.

By Plaintiffs/
Appellants: Lewis, Babcock & Hawkins, L.L.P.
Professor Jim Covington
Chad A. McGowan
Molligan, Cox & Moyer
Pavey & Glickstein
The Keenan Law Firm
Warren Kobatake
Pleasonton Corporation
Malcolm Saxby
Puna Certified Nursery

The undersigned further certify that the following is a full and complete list of all persons serving as attorneys for the parties in this proceeding:

Appellants	A. Camden Lewis
Counsel:	Mary G. Lewis P. Benjamin Zuckerman Anne D. Zuckerman Thomas A. Pendarvis Lewis Babcock & Hawkins, LLP 1513 Hampton Street Columbia, South Carolina 29201 (803) 771-8000
Appellees	A. Stephens Clay, Esquire
Counsel:	William H. Boice, Esquire KILPATRICK & STOCKTON, LLP 1100 Peachtree Street, Suite 2800 Atlanta, GA 30309 (404) 815-6500 J. D. Fleming, Jr., Esquire John A. Chandler, Esquire John H. Fleming, Esquire SUTHERLAND, ASBILL & BRENNAN, LLP 999 Peachtree Street, N.E. Atlanta GA 30309 (404) 853-8000

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1-1, 2, and 3, Appellants state as follows:

A. Prince Nurseries, Inc. has issued no shares to the public and has no affiliates with shares issued to the public.

B. Thomas O. Mahaffey, Jr. Greenhouse, Inc. has issued no shares to the public and has no affiliates with shares issued to the public.

C. Plants, Inc. has issued no shares to the public and has no affiliates with shares issued to the public.

D. Huntsville Greenhouse Corporation has issued no shares to the public and has no affiliates with shares issued to the public.

STATEMENT OF COUNSEL

I express a belief, based on reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or precedents of this Circuit and that considerations by the full court is necessary to secure and maintain uniformity of decisions in this Court, to maintain the integrity of the Federal Rules of Civil Procedure, and the Federal Judicial System:

U.S. Supreme Court Decisions

1. *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238 (1944)

Eleventh Circuit Decisions

1. *Travelers Indemnity Co. v. Gore*, 761 F.2d 1549 (11th Cir. 1985)

2. *Securities & Exchange Commission v. ESM Group, Inc.*, 835 F.2d 270 (11th Cir. 1988)

3. *Woodrum v. Southern Railway Company*, 750 F.2d 876 (11th Cir. 1985)

Federal Rules of Civil Procedure

1. F. R. Civ. P. 8 (e) (pleading in the alternative)

2. F. R. Civ. P. 60 (b) (independent action for Fraud on the Court)

I express a belief, based on reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1. Whether the 11th Circuit will encourage and reward Fraud on the Court, by failing to recognize Fraud on the Court claims are independent of all disputed claims in underlying litigation and such will devitalize any judgment and/or settlement in the underlying litigation.

2. Whether the Federal Rules of Civil Procedure were totally ignored when the 11th Circuit failed to recognize Appellants correctly pled three distinct and separate causes of action: (i) an independent action based upon Fraud on the Court, (ii) an action based upon fraud between the parties, and (iii) for recission; this Court's Opinion treated them as one cause of action.

3. Whether the 11th Circuit incorrectly failed to recognize that eliminating litigation should *never* override subsequent Fraud on the Court actions because, thank goodness, Fraud on the Court and litigation fraud are exceedingly rare and that this type will allow settling litigants who follow the rules to bring a

second lawsuit against those who do not keeping [sic] such activities rare.

/s/ A. Camden Lewis
A. Camden Lewis
Attorney of Record
for Appellants
ELLIS W. LAY, et al.
in Docket No. 97-8899

STATEMENT REGARDING ADOPTION OF ARGUMENTS OF OTHER PARTIES

This pleading incorporates all points made in the Suggestion for Hearing En Banc brief of Appellants Malcolm Saxby and Puna Certified Nursery, in Appeal No. 97-8899, the appeal with which the instant appeal is consolidated.

TABLE OF CONTENTS

Page

Certificate of Interested Persons..... C-1-C-4

Corporate Disclosure Statement..... i

Statements of Counsel..... ii

Statement Regarding Adoption of Arguments of Other Parties..... iv

Table of Contents..... v

Table of Citations..... vii

Statement Of The Issues Asserted To Merit *En Banc* Consideration..... 1

Statement Of The Course Of Proceedings And Disposition Of The Case 1

Statement of Facts Necessary to Argument Of The Issues 2

Arguments and Citations of Authority 7

I. APPELLANTS' CLAIMS WERE NOT RELEASED WITH THE PRODUCT LIABILITY CLAIMS 7

A. FRAUD ON THE COURT claims are independent of all disputed claims in underlying litigation and such will devitalize any judgment and/or settlement 8

B. Appellants correctly pled these distinct and separate causes of action: (i) an independent action based upon FRAUD ON THE COURT, (ii) an action based upon fraud between the parties, and (iii) for recission; this Court's Opinion incorrectly gave identical treatment to all of those claims 12

C. Thank goodness FRAUD ON THE COURT and litigation fraud are exceedingly rare and this will allow settling litigants who follow the rules to bring a second lawsuit against those who do not 13

II. REHEARING *EN BANC* TO CONSIDER APPELLANTS' CLAIMS IS IMPERATIVE TO THE PRESERVATION OF THE INTEGRITY OF THE JUDICIAL SYSTEM 13

A. The *Travelers Indemnity* rule on independent Rule 60(b) FRAUD ON THE COURT claims provides defrauded litigants a remedy 14

Conclusion 15

Certificate of Service ..... Appendix

TABLE OF CITATIONS

Cases: **Page**

Allstate Insurance Co. v. James, 779 F.2d 1536 (11th Cir. 1986) 5, 12

Bilotti v. Accurate Forming Corp., 188 A.2d 24 (N.J. 1963) 13

Brown v. McCormick, 608 F.2d 410 (10th Cir. 1979) 11

Cresswell v. Sullivan & Cromwell, 668 F. Supp. 166 (S.D.N.Y. 1987) 3, 13

DiSabatino v. U.S. Fidelity & Guaranty Co., 635 F. Supp. 350 (D.Del. 1986) 3, 13

H.K. Porter Co. v. Goodyear Tire & Rubber Co., 536 F.2d 1115 (6th Cir. 1976) 11

Hadden v. Rumsey Products, Inc., 196 F.2d 92 (S.D.N.Y. 1952) 10

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944) ..... ii, 5, 7-12, 14

In re E.I. DuPont De Nemours & Company – Benlate Litigation, 99 F.3d 363 (11th Cir. 1996), *cert. denied*, 118 S.Ct. 263 (1997) 3, 6, 7

Phumphrey v. K.W. Thompson Tool Co., 62 F.3d 1128 (9th Cir.), *cert. denied*, 116 S.Ct. 1042 (1996) 11

Securities & Exchange Commission v. ESM Group, Inc., 835 F.2d 270 (11th Cir. 1988) ..... ii, 7

Slotkin v. Citizens Casualty Company of New York, 614 F.2d 301 (2d Cir. 1979) 3, 13

Travelers Indemnity Co. v. Gore, 761 F.2d 1549 (11th Cir. 1985) ..... ii, 7, 10-12, 14

Tuttle v. Stovall, 67 S.E. 806 (Ga. 1910) 12

Woodrum v. Southern Railway Company, 750 F.2d 876 (11th Cir. 1985) 11

Federal Rules of Civil Procedure:

F.R.Civ.P. 8(e) ..... ii, 4, 7

F.R.Civ.P. 12(b)(6) 2

F.R.Civ.P. 60(b) ..... ii, iii, 2-4, 7-11, 14

F.R.Civ.P. 60(b) advisory committee note (1946 amendment) 10

STATEMENT OF THE ISSUES ASSERTED TO MERIT *EN BANC* CONSIDERATION

1. Whether the 11th Circuit will encourage and reward FRAUD ON THE COURT, by failing to recognize FRAUD ON THE COURT claims are independent of all disputed claims in underlying litigation and such will devitalize any judgment and/or settlement in the underlying litigation.

2. Whether the Federal Rules of Civil Procedure were totally ignored when the 11th Circuit failed to recognize Appellants correctly pled three distinct and separate causes of action: (i) an independent action based upon FRAUD ON THE COURT, (ii) an action based upon fraud between the parties, and (iii) for recission; this Court's Opinion treated them as one cause of action.

3. Whether the 11th Circuit incorrectly failed to recognize that eliminating litigation should *never* override subsequent FRAUD ON THE COURT actions because, thank goodness, FRAUD ON THE COURT and litigation fraud are exceedingly rare and that this type will allow settling litigants who follow the rules to bring a second lawsuit against those who do not, keeping such activities rare.

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF CASE

Appellants' Complaint was filed on September 6, 1996. Appellees filed a Motion to Dismiss on October 22, 1996. On November 8, 1996, Appellants filed an Amended Complaint as a matter of right. By Order dated On July 17, 1997 (July 17, 1997 Order), The Honorable Richard C. Freeman (lower court) granted the Appellees' Motion to Dismiss. Appellants timely appealed.

Following briefing by all parties, and oral argument before the panel in Montgomery, Alabama, the Eleventh Circuit issued the published, *per curiam* opinion (December 3, 1998 Opinion) that is the subject of this Suggestion For Rehearing *En Banc*. The December 3, 1998 Opinion affirmed the lower court's dismissal and adopted the lower court's July 17, 1997 Order as the opinion of this Circuit.[1]

STATEMENT OF FACTS NECESSARY TO ARGUMENT OF THE ISSUES

The December 3, 1998 Opinion affirmed a F.R.Civ.P. 12(b)(6) dismissal of Appellants' First Amended Complaint seeking relief under three general theories:

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[1] During argument the main questions centered upon the non-issue of collateral attack upon the judgment; when commenting on the fraud on the court, the panel indicated that its opinion would be written so as to discourage such actions. The subject Opinion does just the opposite.

(1) Independent action FRAUD ON THE COURT for equitable relief;[2]

(2) Fraud between the parties for damages;[3] and

(3) In the alternative, Recission. (R-2-11).

Appellants are nursery owners whose plants and nursery operations were damaged by Benlate 50 DF, a agricultural fungicide (R-2-11-47-48). Appellants brought product liability lawsuits against DuPont seeking recovery in excess of 30 million dollars for damages to their plants and nursery operations caused by Benlate. (R-2-11-22-23). Appellants' lawsuits were consolidated for discovery purposes with cases known as the *Bush Ranch* cases that went to trial in July 1993. (R-2-11-22). The *Bush Ranch* trial was the first of hundreds of Benlate product liability lawsuits to actually go to trial. DuPont deemed it imperative to win at all costs. (R-2-11-47-48). Alston & Bird represented DuPont in the *Bush Ranch* trial and other Benlate cases. (R-2-11-23-25).

The district court issued many Orders specifically requiring the production of documents and evidence at issue in the Appellants' independent F.R.CIV.P. 60(b) FRAUD ON THE COURT lawsuit. (R-2-11); *In re E.I. DuPont de*

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[2] This cause of action is specifically recognized in F.R.CIV.P. 60(b).

[3] Courts in the following cases allowed parties to bring a second lawsuit for fraud damages without regard to previous releases when the opposing party fraudulently breached a duty to disclose information leading to settlement for less than true value. *Slotkin v. Citizens Casualty Company of New York*, 614 F.2d 301 (2d Cir. 1979); *DiSabatino v. U.S. Fidelity & Guaranty Co.*, 635 F. Supp. 350 (D.Del. 1986); and *Cresswell v. Sullivan & Cromwell*, 668 F. Supp. 166 (S.D.N.Y. 1987).

Nemours & Company – Benlate Litigation, 99 F.3d 363, 372 (11th Cir. 1996), *cert. denied* 118 S.Ct. 263 (1997).

It is now known that when the *Bush Ranch* cases went to trial in July 1993, DuPont and its attorneys concealed critical evidence and fabricated and manipulated other damaging evidence supporting plaintiffs' claims that Benlate was contaminated with SUs.[4] Because DuPont in effect "bought" the *Bush Ranch* jury with outright lies and false evidence, the plaintiffs' were not able to effectively prosecute their product liability claims. (R-2-11-28). DuPont emphasized its primary argument over and over to the jury – **There was no evidence of SUs' in plaintiffs' soils.** (R-2-11-24-27). While the jury was deliberating, DuPont and its attorneys got what they wanted – Appellants settled their product liability claims for an amount now known to be far less than fair value. (R-2-11-40-48). After obtaining the fraudulent settlement, DuPont bragged that it paid only 1% of plaintiffs' claimed damages – *i.e.*, nuisance value. (R-2-11-48).

The December 3, 1998 Opinion incorrectly affirmed the lower court's July 17, 1997 Order holding, on a motion to dismiss with all facts alleged taken as true, that Appellants' claims for litigation fraud and their independent claims under F.R.Civ.P. 60(b) for Fraud on the Court were released when the Appellants signed general

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[4] This Court found that the subject hidden "Alta data included analytical findings which some experts would construe as evidence that Benlate 50 DF was contaminated with SU's." *Id.* at 365-66.

releases related to their products liability claims. (R-4-31).[5]

Each of these Appellants' Complaints contain specific allegations of attorney involvement in manipulated fraudulent evidence and procuring perjured testimony, in a scheme to subvert the judicial system. In fact, tracking the exact language used by the U.S. Supreme Court in the seminal FRAUD ON THE COURT case, *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245-46 (1944), Appellants' First Amended Complaint states that DuPont's and Alston & Bird's actions were " 'a deliberately planned and carefully executed scheme to defraud not only the' [Appellants], but also the United States District Court." (R-2-11-63).

Appellants' First Amended Complaint alleges the following acts by DuPont ***and* its attorneys:**

1. Concealing analytical test results which "some experts would construe as evidence that Benlate 50 DF was contaminated with SU's." *In re E.I. DuPont de Nemours & Company – Benlate Litigation*, at 365-66. (R-2-11-33-37);

2. Manufacturing false summaries that were put into evidence by perjured testimony, (R-2-11-33-37), (R-2-11-33-42);

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[5] Contrary to F.R.Civ.P. 8(e) and this Court's holding in *Allstate Insurance Co. v. James*, 779 F.2d 1536, 1540-41 (11th Cir. 1986), the December 3, 1998 Opinion also improperly affirmed the lower court's ruling that Appellants "cannot, as a matter of law, demonstrate that they" meet any of the exceptions to the tender of consideration requirement for recission. (R-4-31-10). This [sic] an equitable issue based on facts pled in the Complaints, which must be taken as true at the pleading stage.

3. Making false statements of fact to the District Court that all Benlate documents and data had been produced when both DuPont *and* its attorneys, Alston & Bird, knew that all responsive documents had not been produced, (R-2-11-29-46);

4. Concealing the existence of a field test conducted in Costa Rica in 1992 that resulted in plant death after application of Benlate, (R-2-11-29-46); and

5. **DuPont's attorneys "participated in the illegal and unfair manipulation of evidence and even the hiding and destroying of evidence;"** (R-2-11-57) (emphasis supplied).[6]

Those false test result summaries, manufactured to conceal the true test results, the Alta documents, were the lynchpin of DuPont's and Alston & Bird's jury arguments that the *Bush Ranch* plaintiffs' soils did not contain SUs. (R-2-11-24-28). In *In re E.I. DuPont de Nemours & Company – Benlate Litigation*, 99 F.3d 363, 365-66, 372 (11th Cir. 1996), this Court said:

> The Alta data included analytical findings which some experts would construe as evidence that **Benlate 50 DF was contaminated with SUs.**

(Emphasis supplied).

DuPont and Alston & Bird then obtained the Releases from Appellants that the December 3, 1998 opinion held

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[6] *See also*, the Order of the Honorable Hugh Lawson, dated November 4, 1998 directing the U.S. Attorney to submit a proposed Show Cause Order naming, in addition to DuPont, any lawyers or others whose "actions or conduct resulted in disobedience or resistence [sic] to a lawful order of the Court . . . "

released all Appellants' claims. These claims are set forth below with the summary legal authority for each claim:

Claim	Authority
Independent FRAUD ON THE COURT for equitable relief	F.R.CIV.P 60(b)
Fraud between the parties for damages	*See* Fn.1
In the alternative, Recission	F.R.CIV.P. 8(e)

ARGUMENT AND CITATIONS OF AUTHORITY

I. APPELLANTS' CLAIMS WERE NOT RELEASED WITH THE PRODUCT LIABILITY CLAIMS.

The published December 3, 1998 Opinion conflicts with the U.S. Supreme Court's holdings in *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238 (1944), prior Eleventh Circuit holdings in *Travelers Indemnity Co. v. Gore*, 761 F.2d 1549 (11th Cir. 1985) and *Securities & Exchange Commission v. ESM Group, Inc.*, 835 F.2d 270 (11th Cir. 1988), and with the language in F.R.CIV.P. 60(b). Appellants' Complaints satisfy the *Hazel-Atlas Glass, Travelers Indemnity,* and *Securities & Exchange Comm'n* requirement that an *independent* action for FRAUD ON THE COURT under F.R.CIV.P. 60(b) allege either (1) **attorney involvement in perjury or manipulation of evidence** or (2) **a deliberate scheme to directly subvert the judicial process threatening an injury to the public.** The undisputed facts in Appellants' Complaints alleged both.

A. FRAUD ON THE COURT claims are independent of all disputed claims in underlying litigation and such will devitalize any judgment and/or settlement.

The *independent* cause of action based upon FRAUD ON THE COURT is not released with disputed claims released in the underlying litigation. *See, Hazel-Atlas Glass Co.*, at 243-47. In *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, Hartford and Hartford's attorneys perpetrated a fraud on the U.S. Patent and Trademark office (PTO) in 1926 in support of a patent application, then sued Hazel-Atlas for patent infringement. After the district court dismissed the action, Hartford appealed. Hartford's appeal relied on the fraudulent article used to perpetrate the fraud on the PTO. In 1932 the judgment in favor of Hazel-Atlas was reversed, with a finding that Hartford was the holder of a valid patent which Hazel-Atlas had infringed. Based on the strength of that judgment, the parties entered into a release and a *settlement* agreement. *Id.* at 251.

Twelve years after the judgment, the U.S. Supreme Court "devitalized" the judgment and, thus the settlement, obtained by FRAUD ON THE COURT after the defrauded party, Hazel-Atlas, brought an **independent action.** The Supreme Court ignored the fraudfeasor's arguments that the parties' settlement agreement precluded relief based on FRAUD ON THE COURT.[7]

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[7] *See*, Pages 20-21, and 67-69 of the Hartford Empire Company's Brief to the United States Supreme Court from the Record On Appeal in *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238 (1944), included with the Affidavit of Thomas A. Pendarvis, which is attached hereto as Exhibit 1.

The United States Supreme Court's ruling preserved a federal court's power to do equity, regardless of any settlement agreements, when a party and its lawyers perpetrate a FRAUD ON THE COURT. *Id.* at 244-51. Equitable relief against fraudulent judgments was "[c]reated to avert the evils of archaic rigidity," and "has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations." *Id.* at 248. That is all that Appellants ask here. The Appellants' claims for FRAUD ON THE COURT is an equitable cause of action based upon the same type actions condemned in *Hazel-Atlas.* (R-2-11-62-63).

F.R.CIV.P. 60(b) recognizes FRAUD ON THE COURT claims as "independent claims." The Appellants had no knowledge or reason to know of the fraud. The releases at issue in these cases are for the products liability claims. As the Supreme Court said in *Hazel-Atlas,* actions as alleged here[8] will "devitalize" what was done before.

As recognized by the Advisory Committee's notes,

> Two types of procedure to obtain relief from judgments are specified in the rules . . . One procedure is by motion in the court and in the action in which the judgment was rendered. The other procedure is by a new or independent action to obtain relief from a judgment, which action may or may not be begun in the court which rendered the judgment.

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[8] Action this very Court said would support criminal contempt.

F.R.Civ.P. 60(b) advisory committee note (1946 amendment); *see also, Hadden v. Rumsey Products, Inc.*, 196 F.2d 92 (S.D.N.Y. 1952) (judgment entered in one U.S. District Court could be independently attacked in another U.S. District Court).[9]

A claim for an *independent* action for FRAUD ON THE COURT under F.R.Civ.P. 60(b) is allowed as this Court set forth in *Travelers Indemnity Co. v. Gore*, 761 F.2d 1549, 1551 (11th Cir. 1985). (R-2-11). To ensure that the "fraud" for an independent F.R.Civ.P. 60(b) claim rises to the level of FRAUD ON THE COURT, in *Travelers Indemnity* this Court set forth the following qualifying criteria:

> "Fraud on the court" should, we believe, embrace only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication, and relief should be denied in absence of such conduct. Fraud *inter parties*, without more, should not be fraud on the court, but redress should be left to a motion under Rule 60(b)(3) **or to an independent action.** (emphasis supplied).

Travelers Indemnity Co., 761 F.2d at 1551. Because DuPont's attorneys as officers of the court, were involved in the fraud, the United States Supreme Court and all of the Circuit Courts of Appeal, including this Court until

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[9] This Court has the equitable power to reverse and remand this case with venue in the United States District Court for the Middle District of Georgia where the FRAUD ON THE COURT was committed.

now, have held that the allegations similar to those in the First Amended Complaint satisfy the necessary elements to state an independent claim for F.R.Civ.P. 60(b) Fraud on the Court. *Hazel-Atlas*, at 245-46; *Travelers Indemnity*, at 1552; *see, e.g., Phumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128 (9th Cir.), *cert. denied*, 116 S.Ct. 1042 (1996); *Brown v. McCormick*, 608 F.2d 410, 414 (10th Cir. 1979); *H.K. Porter Co. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1118 (6th Cir. 1976).

The December 3, 1998 Opinion held that:

> . . . however egregiously defendants may have behaved during the prior litigation, Plaintiffs' execution of such an all-encompassing release prohibits them from suing defendants for that behavior.[10] (R-4-31-5).

The published December 3, 1998 Opinion promotes Fraud on the Court because there is no consequence.

The facts and claims alleged in Appellants' Complaints states an independent claim under *Hazel-Atlas* regardless of any releases.

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[10] Under this reasoning, a litigant could bribe a judge, and thereby, obtain a settlement from the unsuspecting other side with an "all-encompassing" release, and thereafter, be insulated from civil liability for his illegal and fraudulent acts.

B. Appellants correctly pled three distinct and separate causes of action: (i) an independent action based upon FRAUD ON THE COURT, (ii) an action based upon fraud between the parties, and (iii) for recission; this Court's Opinion incorrectly gave identical treatment to all of those claims.

Appellants' Complaints sought relief under three separate theories as set forth above, the second and third of which were pled in the alternative as allowed under F.R.CIV.P. 8(e). *See Allstate Insurance Co. v. James*, 779 F.2d 1536, 1540-41 (11th Cir. 1986). The lower court held as a matter of law that Appellants had elected between the alternative causes of action. (R-4-31). This belies all logic since the recission cause of action was pled in the alternative and no request or motion to elect was made if one were appropriate.

Appellants' Complaints sought to rescind the judgment, settlement agreements, and releases. Without question, Appellants have a right to rescind; The only question, which is a question of fact for the jury, is whether under Georgia law Appellants would have to tender or return the settlement money. *See Tuttle v. Stovall*, 67 S.E. 806 (Ga. 1910). The December 3, 1998 Opinion incorrectly gave identical treatment to the three separate theories pled alternatively.

C. Thank goodness FRAUD ON THE COURT and litigation fraud are exceedingly rare and this will allow settling litigants who follow the rules to bring a second lawsuit against those who do not.

It was clear during oral arguments that the panel was concerned about issuing an Opinion allowing Appellants to proceed to trial without opening up "the floodgates of litigation."

Appellants cite four cases of ordinary fraud between the parties based upon nondisclosure. *Slotkin v. Citizens Casualty Company of New York*, 614 F.2d 301 (2d Cir. 1979); *DiSabatino v. U.S. Fidelity & Guaranty Co.*, 635 F. Supp. 350 (D.Del. 1986); *Cresswell v. Sullivan & Cromwell*, 668 F. Supp. 166 (S.D.N.Y. 1987); and *Bilotti v. Accurate Forming Corp.*, 188 A.2d 24 (N.J. 1963). These courts allowed parties to proceed with lawsuits based on fraudulent nondisclosure during earlier litigation without being barred by settlement agreements or releases in the underlying litigation. Review of the citations to those opinions, some of which were issued more than 30 years ago, demonstrates that allowing litigants damaged by fraudulent nondisclosure to proceed in a second independent action has not opened the floodgates for thousands of litigants to have a second bite at the apple.

Thank goodness this type activity is rare. It should not be protected.

II. REHEARING *EN BANC* TO CONSIDER APPELLANTS' CLAIMS IS IMPERATIVE TO THE PRESERVATION OF THE INTEGRITY OF THE JUDICIAL SYSTEM.

The Eleventh Circuit cannot allow the published December 3, 1998 Opinion to remain the law in this Circuit without doing great damage to integrity of the judicial system, without overruling *Travelers Indemnity, without* denying Appellants their rights to pursue an independent FRAUD ON THE COURT claim secured by the United States Supreme Court in *Hazel-Atlas,* and without re-writing the Federal Rules of Civil Procedure.

A. The *Travelers Indemnity* rule on independent Rule 60(b) FRAUD ON THE COURT claims provides defrauded litigants a remedy.

Without a rehearing to correct the errors in the December 3, 1998 Opinion, considering the rule of law in *Travelers Indemnity* and in *Hazel-Atlas,* future litigants will either have to include descriptions of hundreds of potential claims, including claims of FRAUD ON THE COURT, in every release or be left without a remedy. Leaving the holding undisturbed will likely create unnecessary obstacles to the otherwise routine settlement practices in this Circuit before the December 3, 1998 Opinion.

The subject Opinion allows insertion of the words "known and unknown" in the Releases to leave Appellants without a remedy for damages caused by DuPont's and its attorneys' vicious manipulation of the judicial system. Appellants' valid FRAUD ON THE COURT claims, and

their faith in the integrity of the judicial system, were sacrificed on the altar of finality of judgments.

CONCLUSION

Based on the foregoing, Appellants respectfully request that this Court give *en banc* consideration to correct the precedent-setting error of exceptional importance should the December 3, 1998 opinion be allowed to stand.

LEWIS, BABCOCK & HAWKINS, L.L.P.

/s/ A. Camden Lewis
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December ___, 1998

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DOCKET NOS. 97-8914 & 97-8899

ELLIS W. LAY, individually and d/b/a WINTERGREEN NURSERIES; PRINCE NURSERIES, INC., a North Carolina corporation; JAMES OLIVER PRINCE, JR.; JAMES OLIVER PRINCE, SR.; LYNN HAYES, individually and d/b/a LYNN'S NURSERIES; THOMAS O. MAHAFFEY, JR. GREENHOUSE, INC., a Florida corporation; THOMAS O. MAHAFFEY, JR.; and GEORGE S. FERGUSON and JACQUELINE D. FERGUSON, individually and d/b/a SCRUB OAK FOLIAGE; PLANTS, INC. a Texas corporation; HUNTSVILLE GREENHOUSE CORPORATION, a Texas corporation; MURPHY PROPERTIES, a Texas General Partnership; FLETCHER C. MURPHY, JR., Individually; and MARTHA C. MURPHY, individually,

Appellants,

v.

E. I. DUPONT DE NEMOURS AND COMPANY, a Delaware corporation; and ALSTON & BIRD, a Georgia Partnership,

Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

CERTIFICATE OF SERVICE

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Mary G. Lewis
P. Benjamin Zuckerman
Anne D. Zuckerman
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This is to certify that I have this date served a true and correct copies [sic] of the foregoing **SUGGESTION OF REHEARING EN BANC** upon counsel of record by United States mail, first-class postage prepaid, to the following:

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December 23, 1998

Exhibit

1

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DOCKET NOS. 97-8914 & 97-8899

ELLIS W. LAY, individually and d/b/a WINTERGREEN NURSERIES; PRINCE NURSERIES, INC., a North Carolina corporation; JAMES OLIVER PRINCE, JR.; JAMES OLIVER PRINCE, SR.; LYNN HAYES, individually and d/b/a LYNN'S NURSERIES; THOMAS O. MAHAFFEY, JR. GREENHOUSE, INC., a Florida corporation; THOMAS O. MAHAFFEY, JR.; and GEORGE S. FERGUSON and JACQUELINE D. FERGUSON, individually and d/b/a SCRUB OAK FOLIAGE; PLANTS, INC. a Texas corporation; HUNTSVILLE GREENHOUSE CORPORATION, a Texas corporation; MURPHY PROPERTIES, a Texas General Partnership; FLETCHER C. MURPHY, JR., Individually; and MARTHA C. MURPHY, individually,

Plaintiffs/Appellants,

v.

E. I. DUPONT DE NEMOURS AND COMPANY, a Delaware corporation; and ALSTON & BIRD, a Georgia Partnership,

Defendants/Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

AFFIDAVIT OF THOMAS A. PENDARVIS

STATE OF SOUTH CAROLINA)
) SS:
COUNTY OF RICHLAND)

Personally appeared before me, Thomas A. Pendarvis, who, first being duly sworn, says:

1. My name is Thomas A. Pendarvis, and I am an attorney representing Appellants in the above-captioned action.

2. In preparing and researching Appellants' Suggestion for Rehearing En Banc, I made copies of materials included in the Record on appeal in *Hazel-Atlas Glass Company v. Hartford Empire Company*, 322 U.S. 238 (1944), which are stored on microfiche at the University of South Carolina School of Law Library in Columbia, South Carolina.

3. Attached as Exhibit A to this Affidavit is a true and correct copy of the cover page, and pages 20-21 and 67-69 of the "Brief for Respondent Hartford-Empire Company" in *Hazel-Atlas Glass*.

4. Because the entire Brief of Respondent Hartford Empire Company is 82 pages in length, only the portions related to Hartford-Empire's arguments regarding the settlement and release agreement were attached to this Affidavit.

/s/ Thomas A. Pendarvis
Thomas A. Pendarvis

SWORN to before me this

22nd day of December, 1998

/s/ Connie W. Grugen (L.S.)
NOTARY PUBLIC FOR SOUTH CAROLINA

My commission expires 1/24/2006

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

ELLIS W. LAY, individually and d/b/a WINTERGREEN NURSERIES; PRINCE NURSERIES, INC, a North Carolina corporation; JAMES OLIVER PRINCE, JR.; LYNN HAYES, individually and d/b/a LYNN'S NURSERIES; THOMAS O. MAHAFFEY, JR. GREENHOUSE, INC., a Florida corporation; THOMAS O. MAHAFFEY, JR.; and GEORGE S. FERGUSON and JACQUELINE D. FERGUSON, individually and d/b/a SCRUB OAK FOLIAGE,

Plaintiffs,

vs.

E.I. DUPONT DE NEMOURS AND COMPANY, a Delaware corporation; and ALSTON & BIRD, a Georgia Partnership,

Defendants,

CIVIL ACTION

NO: 1 96-CV 2303

COMPLAINT
(Jury Trial Demanded)
(Filed Sept. 6, 1996)

The Plaintiffs, complaining of the Defendants above-named, would through their undersigned counsel respectfully show unto the Court the following:

TYPE OF ACTION

This action is brought by the plaintiffs against DUPONT, a chemical company, and ALSTON & BIRD, a law firm. It centers itself upon causes of action in fraud, recision, fraud on the courts, civil conspiracy, spoilation of evidence, unfair trade practices, public nuisances, and racketeering. The allegations are brought by nurserymen whose plants were damaged by DUPONT's product, Benlate 50DF, and who brought suit against DUPONT who was defended by ALSTON & BIRD. This Action centers itself on the illegal, improper,

* * *

JURISDICTION

8. Original jurisdiction in this United States District Court is proper pursuant to 28 U.S.C. § 1331 (1980) as claims contained herein arise under the laws of the United States; 28 U.S.C. § 1332 (1980) as there is complete diversity of citizenship between plaintiffs and defendants and the amounts in controversy are in excess of Fifty Thousand ($50,000.00) Dollars, exclusive of interest and costs; and supplemental jurisdiction is proper pursuant to 28 U.S.C. § 1367 (1992) as other claims contained herein are so related to the claims within the original jurisdiction

of this Court as to form a part of the same case or controversy under Article III of the United States Constitution.

VENUE

9. Venue in the United States District Court for the Northern District of Georgia is proper pursuant to 28 U.S.C. § 1391(b)(3) (1992) and Local Rule 105-2(a) as this action founded on 28 U.S.C. § 1331 and 28 U.S.C. § 1332 (1980) is brought in the United States District Court for the Northern District of Georgia, which is the principal location of Defendant, ALSTON & BIRD.

GENERAL FACTS

10. DUPONT is registered with the United States Environmental Protection Agency ("EPA") as a manufacturer and distributor of numerous pesticide compounds. Under the general heading of chemical compounds manufactured by DUPONT known as *"pesticides"* are the subcategories of *insecticides, herbicides,* and *fungicides.*

11. One of the active *fungicide* ingredients manufactured by DUPONT is a substance identified as *benomyl* that was sold by DUPONT under the trade name "Benlate." DUPONT originally marketed the product as "Benlate 50WP" with the "WP" referring to the

* * *

releasing their claims against DUPONT, fraudulently induced into signing their respective settlement agreements with DUPONT, and are therefore entitled to rescind each of their respective settlement agreements,

releases, and stipulations of dismissal with prejudice, retain the funds paid to Plaintiffs as part of the fraudulently induced "settlement" to be set-off against Plaintiffs' recovery in the trial of this case and have the dismissal with prejudice previously entered for each of the Plaintiffs' cases against DUPONT voided and nullified. The Plaintiffs' original cases should go forward as to damages only with any DUPONT answer being stricken and DUPONT found in default and any settlement funds actually received by Plaintiffs be a set-off.

FOR A THIRD CAUSE OF ACTION
(Fraud on the Court)

217. Paragraphs 1 through 183 hereinabove are reiterated and realleged as though set forth verbatim.

218. The allegations contained hereinabove present clear evidence that much of the argument, evidence and testimony used by DUPONT during *Bush Ranch* was knowingly false, and was designed to allegedly achieve judgment in favor of DUPONT.

219. DUPONT, ALSTON & BIRD, and/or other unnamed parties had knowledge and/or access to information directly contrary to DUPONT's central defense concerning SUs.

220. Plaintiffs have recently obtained copies of depositions, correspondence, notes and altered material that clearly demonstrates that DUPONT, ALSTON & BIRD, and/or other unnamed parties misrepresented evidence, hid facts, manipulated testing and hid testing contrary to the presented finding regarding Benlate problems.

221. Based upon the above facts and allegations, Plaintiffs assert that DUPONT, ALSTON & BIRD, and/or other unnamed parties have committed fraud upon the Court, in that Plaintiffs and/or *Bush Ranch* plaintiffs were deprived of the use of the right to fairly cross-examine DUPONT's experts, deprived of the use of true test results and field test results, were forced to respond to manipulated documents, and were deprived of truthful testimony from DUPONT experts. Plaintiffs were injured by the perjured testimony and/or fraudulently deceived in respect to the merits and/or value of their respective cases or claims.

222. Based upon illegal conduct of counsel DUPONT, ALSTON & BIRD and/or other unnamed parties during *Bush Ranch,* false testimony from DUPONT experts, and/or the discovery abuses, Plaintiffs were coerced and/or compelled by the circumstances to agree to settle their claims against DUPONT, sign releases of their claims arising from use of Benlate 50DF and/or Benlate 50WP, agree to the dismissal with prejudice of their lawsuits against DUPONT and/or accept considerably far less than fair settlement of their claims.

223. No party, be it an individual or a corporation, can disregard the authority of the judicial branch and disempower the American jury. No party, be it an individual or a corporation, can unilaterally *decide* the evidence.

224. As a direct and proximate result of the fraud on the court committed by DUPONT, ALSTON & BIRD, and/or other unnamed parties, the dismissal with prejudice previously entered for each of the Plaintiffs' cases

against DUPONT should be voided and nullified. The Plaintiffs' original cases should go forward as to damages with any DUPONT answer being stricken and DUPONT found in default with any funds actually received by Plaintiffs in settlement being a set-off.

* * *

E. Destroying evidence, records, and/or other relevant materials as set forth above.

Each of the predicate offenses are related because they have the same or similar purpose of illegal defense tactics in all of the Benlate-related lawsuits. Defendants called this strategy "Path Forward," and hoped that through this use of perjured testimony, falsified documents, and by hiding documents and witnesses, the results would be the same or similar in any and all potential or existing litigation: decreasing or eliminating DUPONT's liability.

255. It was solely through fortuitous circumstances that Plaintiffs discovered Defendants' illegal activities. Defendants have hundreds of millions of dollars at stake; they will not hesitate to do whatever is necessary now and in the future to ensure the success of "Path Forward."

256. For *each and every* wave of litigation, Defendants have generated a new illegal scheme – each illegal scheme was tailor-made to eliminate or substantially *minimize* Benlate claims. In addition to these Plaintiffs, courts from both East and West coasts have been manipulated and victimized by "Path Forward" schemes, with Defendants making a mockery of the fundamental notions of Justice.

257. By reason of and as a direct result of Defendants' violation of RICO, 18 U.S.C. § 1962(c), Plaintiffs have been injured and damaged in excess of Ten million dollars.

258. Plaintiffs are entitled to actual damages in such amount as the jury shall award, treble damages; and attorney's fees.

WHEREFORE, Plaintiffs, pray this Court enter judgment against Defendants, E.I. DuPont de Nemours and Company; and Alston & Bird; jointly and severally and that this Honorable Court grant the Plaintiffs an amount in excess of Forty Million ($40,000,000.00) Dollars for the actual, consequential, and/or incidental damages sustained by the Plaintiffs; for punitive damages; for treble damages where appropriate; for injunctive relief where appropriate; for rescission and entering default where appropriate; for a trial by jury as to all issues; and/or for such other and further relief for the Plaintiffs as the Court deems just and proper.

LEWIS, BABCOCK &
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1513 Hampton Street
Post Office Box 11208
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(803) 771-8000

/s/ Thomas A. Pendarvis
Thomas A. Pendarvis
(Ga. Bar No. 571110)

Attorneys for the Plaintiffs

Of Counsel:
A. Camden Lewis
Mary G. Lewis

Columbia, South Carolina
September 5, 1996.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

ELLIS W. LAY, individually and d/b/a WINTERGREEN NURSERIES, PRINCE NURSERIES, INC., a North Carolina corporation; JAMES OLIVER PRINCE, JR.; LYNN HAYES, individually and d/b/a LYNN'S NURSERIES; THOMAS O. MAHAFFEY, JR. GREENHOUSE, INC., a Florida corporation; THOMAS O. MAHAFFEY, JR.; and GEORGE S. FERGUSON and JACQUELINE D. FERGUSON, individually and d/b/a SCRUB OAK FOLIAGE, PLANTS, INC. a Texas corporation, HUNTSVILLE GREENHOUSE CORPORATION, a Texas corporation, MURPHY PROPERTIES, a Texas General partnership, FLETCHER C. MURPHY, JR., Individually, and MARTHA C. MURPHY, individually,	CIVIL ACTION NO. 1 96-CV 2303
Plaintiffs,	
vs.	
E.I. DUPONT DE NEMOURS AND COMPANY, a Delaware corporation; and ALSTON & BIRD, a Georgia Partnership,	
Defendants.	

FIRST AMENDED COMPLAINT
(Jury Trial Demanded)

(Filed Nov. 12, 1996)

The Plaintiffs, complaining of the Defendants above-named, would through their undersigned counsel respectfully show unto the Court the following:

I. TYPE OF ACTION

1. This action is brought by the Plaintiffs against DUPONT, a chemical company, and ALSTON & BIRD, a law firm. It centers itself upon the causes of action of fraudulent nondisclosure of material fact, fraud, racketeering and fraud on the Court. The acts of nondisclosure, fraud, racketeering and fraud on the Court encompass the activities of

* * *

36. WARREN YAP, is a DUPONT Chemist who developed Benlate 50DF.

37. At all relevant times, NICHOLAS ALBERGO, ALTA LABS, ROBERT BETHEM, MORRIS A. BAILEY, THOMAS A. BURKE, CROWELL & MORING, TODD R. DAVID, GEORGE A. FRANK, ELIZABETH A. GILLEY, BRUCE A. HADLEY, DOW N. KIRKPATRICK, J. KENNARD NEAL, TIMOTHY R. OBRIGAWITCH, ROBERT PETERSON, GERALD STEPHENSON, EDGAR S. WOOLARD, JR. and WARREN YAP were DUPONT's agents and joint venturers acting within the course and scope of their agency or joint venture, and each of their acts and omissions were authorized by DUPONT and ratified by

DUPONT. The above individuals were also DUPONT's co-conspirators.

V. JURISDICTION

38. Original jurisdiction in this United States District Court is proper pursuant to 28 U.S.C. § 1331 (1980) as claims contained herein arise under the laws of the United States; 28 U.S.C. § 1332 (1980) as there is complete diversity of citizenship between plaintiffs and defendants and the amounts in controversy are in excess of Fifty Thousand ($50,000.00) Dollars, exclusive of interest and costs; and supplemental jurisdiction is proper pursuant to 28 U.S.C. § 1367 (1992) as other claims contained herein are so related to the claims within the original jurisdiction of this Court as to form a part of the same case of controversy under Article III of the United States Constitution.

VI. VENUE

39. Venue in the United States District Court for the Northern District of Georgia is proper pursuant to 28 U.S.C. § 1391(b)(3) (1992) and Local Rule 105-2(a) as this action founded on 28 U.S.C. § 1331 and 28 U.S.C. § 1332 (1980) is brought in the United States District Court for the Northern District of Georgia, which is the principal location of

* * *

Plaintiffs extreme emotional distress, the loss of use of money and attorneys' fees. Additionally, Plaintiffs are entitled to punitive damages.

FOR A SECOND CAUSE OF ACTION
INTENTIONAL NONDISCLOSURE OF MATERIAL FACT

255. Paragraphs 1 through 254 hereinabove are reiterated and realleged as though set forth verbatim.

256. Based upon the above, it is clear that Defendants intentionally concealed material facts including, but not limited to, the ALTA documents, the BAM documents, and the Costa Rica test information.

257. The purpose of the intentional concealment was to obtain an advantage in the underlying lawsuit and/or to benefit DUPONT in the amount of money to be paid in the settlement of the subject claims.

258. The Plaintiffs' subsequent and proximate actual damages are the difference between the amount which was actually paid on the underyling case and the amount of settlement which should have been paid absent the illegal conduct of the Defendants, Plaintiffs' extreme emotional distress, the loss of use of money and attorneys' fees. Additionally, Plaintiffs are entitled to punitive damages.

FOR A THIRD CAUSE OF ACTION
FRAUD ON THE COURT
(Independent Action Recognized in FRCP Rule 60(b))

259. Paragraphs 1 through 258 hereinabove are reiterated and realleged as though set forth verbatim.

260. The Plaintiffs' settlements with DUPONT were induced by fraudulent concealments, nondisclosures and/or fraud upon the Court.

261. The paragraphs of 241 through 250 are realleged here so as to satisfy any requirement of F.R.C.P. Rule 9 in pleading fraud with specificity.

262. The actions described above set forth a deliberately planned and carefully executed scheme to defraud not only the Plaintiffs, but also the United States District Court.

263. Tampering with the administration of justice in the manner shown hereinabove involves more than an injury to a single litigant. It is a wrong against the institution set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society.

264. The actions set forth above subverted the integrity of the United States District Court itself. It was perpetrated by officers of the Court so that the judicial process could not function in its fair and impartial manner.

265. The Plaintiffs herein ask that they be relieved from the judgments and settlements in the underlying matters as recognized and allowed in F.R.C.P. Rule 60(b). Specifically, as set forth above, such judgments and settlements were obtained by fraud upon the Court.

266. This action survives all settlements, judgments, proceedings, or orders.

267. The equitable relief requested is that Plaintiffs be allowed to prove the fraud upon the Court, and as a consequence thereof that the Court order that they be awarded the difference between the settlements received and the settlement values had there been no fraud upon

the Court, that sanctions, both in dollars and otherwise, against the Defendants be awarded as the Court shall determine, that attorney's fees be paid, that punitive damages be paid in an appropriate amount, and for such other appropriate relief as the Court shall deem just and proper. It is further requested that a jury be used for the finding of fraud on the court and damages.

* * *

327. The Plaintiffs' subsequent and proximate damages are the difference between the amount which was actually paid in the settlement of the underlying case and the amount which would have been the fair settlement value of the *Bush Ranch* case if the Plaintiffs had not been deceived, their extreme emotional distress, the loss of use of money and attorney's fees.

FOR THE THIRTEENTH CAUSE OF ACTION
(Punitive Damages)

328. Paragraphs 1 through 327 hereinabove are reiterated and realleged as though set forth verbatim.

329. The Defendants, DUPONT and ALSTON & BIRD, acted wantonly, willfully and recklessly with such malice that implies the spirit of mischief or criminal indifference to civil obligations, and engaged in willful misconduct or with that entire want of care which would raise the presumption of a conscious indifference to consequences by clear and convincing evidence warranting the imposition of punitive damages.

330. The Plaintiffs are entitled to punitive damages as the jury shall award on the First, Second, third and Thirteenth Causes of Action.

WHEREFORE, Plaintiffs demand judgment against Defendants, jointly and severally, as follows:

1. Special damages in an amount to be proven at trial;

2. Punitive damages in an amount to be determined by the jury;

3. Treble damages;

4. Equitable relief estopping DUPONT from asserting the releases and order procured by the fraud and criminal acts, or alternatively, such other equitable relief as deemed appropriate by this Court;

5. Injunctive relief in nuisance;

6. Prejudgment interest;

7. Cost of investigation and suit;

8. Attorneys' fees; and

9. Such other relief as the Court deems proper.

LEWIS, BABCOCK & HAWKINS, L.L.P.

/s/ Thomas A. Pendarvis

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November 8, 1996.

Motions for admission *pro hac vice*
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Attorneys for Plaintiffs

THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

WARREN KOBATAKE, Individually, PLEASONTON CORPORATION, a Hawaii Corporation, MALCOLM R. SAXBY, Individually, and PUNA CERTIFIED NURSERY, a Hawaii corporation, Plaintiffs, vs.	Civil No. 96 00776SP COMPLAINT FOR FRAUD, RACKETEERING CONSPIRACY, MISREPRESENTATION, ABUSE OF PROCESS, BREACH OF CONTRACT, INFLICTION OF EMOTIONAL DISTRESS, INTERFERENCE WITH PROSPECTIVE

E.I. du-PONT de NEMOURS AND COMPANY, a Delaware Corporation, and ALSTON & BIRD, A Georgia Partnership Including Professional Corporations,	ECONOMIC ADVANTAGE, NEGLIGENCE, SPOLIATION OF EVIDENCE and PUNITIVE DAMAGES; DEMAND FOR JURY TRIAL; EXHIBITS "a" – "c"; SUMMONS
Defendants.	(Filed Sep 19 1996)

COMPLAINT FOR FRAUD, RACKETEERING, CONSPIRACY, MISREPRESENTATION, ABUSE OF PROCESS, BREACH OF CONTRACT, INFLICTION OF EMOTIONAL DISTRESS, INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE, NEGLIGENCE, SPOLIATION OF EVIDENCE and PUNITIVE DAMAGES

Plaintiff WARREN KOBATAKE, Individually, PLEASONTON CORPORATION, a Hawaii Corporation, MALCOLM R. SAXBY, Individually, and PUNA CERTIFIED NURSERY, a Hawaii Corporation, allege against Defendants, jointly and severally, as follows:

INTRODUCTION

1. This is a fraud case. It is brought by two Hawaii nurserymen, WARREN KOBATAKE and his business, the PLEASONTON CORPORATION, and by MALCOLM R. SAXBY and his business, PUNA CERTIFIED NURSERY, INC., in connection with a continuing scheme devised, conducted, and/or participated in by

* * *

negligence, (ix) spoliation of evidence, and (x) punitive damages.

11. The relief sought includes compensatory damages, punitive damages and treble damages arising from the scheme to defraud as set forth herein, equitable relief estopping DUPONT from asserting the releases and orders procured by fraud and/or misrepresentation, or alternatively, such other equitable relief as is deemed appropriate by the Court, prejudgment interest, costs of investigation and suit, and attorney's fees.

JURISDICTION

12. The jurisdiction of this Court over the subject matter of this action is predicated on 18 U.S.C. Section 1964 and 28 U.S.C. Sections 1331 and 1367. In addition, this Court has original jurisdiction under 28 U.S.C. Section 1332, in that it is a civil action between citizens of different states in which the matter in controversy exceeds $50,000.00, exclusive of interest and costs.

* * *

that could greatly expedite litigation elsewhere, save other courts tremendous time and expense, further the administration of justice and assist farmers in proving their claims. DUPONT does so with the purpose of making each future claimant spend hundreds of thousands of dollars and work for years, in the hope they will be intimidated into dropping their claims, settling cheap or not pursuing the claim at all.

FIRST CLAIM FOR RELIEF

(Fraud)

237. Paragraphs 1 through 236 are incorporated herein by reference.

238. Defendants had scienter or knowledge of the falsity of the representations above-described and knowledge of the fraudulent concealments and non-disclosures of material facts above-mentioned.

239. Defendants had scienter or did knowingly intend to defraud, manipulate and/or deceive Plaintiffs, and other Benlate claimants, and to induce Plaintiffs' reliance and to induce Plaintiffs to act to their detriment and to enter into and sign settlement agreements and to agree to dismiss certain claims relating to use of Benlate.

240. Plaintiffs herein reasonably relied on the statements, conduct, testimony and/or other representations made by DUPONT and ALSTON & BIRD and their agents, and reasonably relied on DUPONT and ALSTON & BIRD and their agents to obey statutes, court orders, court rules, rules of evidence, written agreements, representations to the court by officers of the court, and representations made under oath to the court by DUPONT's officers and agents. Plaintiffs did so rely and were misled and defrauded and fraudulently induced into settling and dismissing their claims against DUPONT, and have thereby sustained damage and injury in an amount to be shown at trial an amount exceeding the jurisdictional threshold of this Honorable Court.

241. The above described conduct by Defendants constitutes fraud.

242. As a direct and proximate result of Defendants conduct described herein, Plaintiffs suffered financial losses, including but not limited to settling their cases for substantially less than their true value, extreme emotional distress, lost business opportunities, loss of use of money they should have had, and other damages to be proven at trial.

SECOND CLAIM FOR RELIEF

(Racketeering in violation of 18 U.S.C. Section 1962(c))

243. Paragraphs 1 through 242 are incorporated herein by reference.

244. DUPONT and ALSTON & BIRD are "Persons" within the meaning of 18 U.S.C. Sections 1961(3) and 1964(c).

245. DUPONT, in conjunction with ALSTON & BIRD and others, formed an "enterprise" within the meaning of 18 U.S.C. Sections 1961(4) and 1962(c), which enterprise was engaged in and the activities of and which affected interstate commerce during the relevant times.

246. The conduct of DUPONT, ALSTON & BIRD, and others with respect to the intentional concealment of the BAM and BPM documents, as well as the test results identifying contamination in the Bartlo lots described herein; with

* * *

273. DUPONT and ALSTON & BIRD acted wantonly, oppressively, with such malice as implies a spirit of mischief or criminal indifference to civil obligations, and

engaged in willful misconduct or with that entire want of care which would raise the presumption of a conscious indifference to consequences, by clear and convincing evidence warranting the imposition of punitive damages.

WHEREFORE, Plaintiffs demand judgment against Defendants, jointly and severally, as follows:

a. General damages in an amount to be determined by the jury;

b. Special damages in an amount to be proven at trial;

c. Punitive damages in an amount to be determined by the jury;

d. Treble damages;

e. Equitable relief estopping DUPONT form [sic] asserting the releases and orders procured by fraud and/or misrepresentation, or alternatively, such other equitable relief as is deemed appropriate by the Court;

f. Prejudgment interest;

g. Costs of investigation and suit;

h. Attorney's fees; and

i. Such other relief as the Court deems proper.

DATED: Honolulu, Hawaii, September 19, 1996.

/s/ Howard Glickstein
JUDITH ANN PAVEY
HOWARD GLICKSTEIN
Attorneys for Plaintiffs

DEMAND FOR TRIAL BY JURY

Plaintiffs hereby demand trial by jury on all issues so triable herein.

DATED: Honolulu, Hawaii, September 19, 1996.

/s/ Howard Glickstein
JUDITH ANN PAVEY
HOWARD GLICKSTEIN
Attorneys for Plaintiffs

In re E.I. DuPONT DE NEMOURS & COMPANY-BENLATE LITIGATION.
The BUSH RANCH, INC., William R. Lawson, individually, Yellow River Growers, C. Raker & Sons, Inc., a Michigan corporation, Petitioners-Counter-Defendants-Appellees,
C. Neal Pope, a Georgia resident, Pope, McGlamry, Kilpatrick & Morrison, a Georgia partnership, Counter-Defendants,

v.

E.I. DuPONT DE NEMOURS & COMPANY, a Delaware corporation, Respondent-Counterclaimant, Appellant.

No. 95-9059.

United States Court of Appeals, Eleventh Circuit.

Oct. 17, 1996.

Edward W. Warren, Christopher Landau, Patrick F. Philbin, Kirkland & Ellis, Washington, DC, Arthur J. England, Jr., Greenberg, Taurig, Hoffman, Lipoff, Rosen & Quentel, P.A., Miami, FL, John K. Train, III, Alston & Bird, Atlanta, GA, for respondent-counterclaimant, appellant.

C. Neal Pope, Max R. McGlamry, & Wade H. Tomlinson, Pope McGlamry Kilpatrick & Morrison, Columbus, GA, William U. Norwood, Michael L. McGlamry, Pope McGlamry Kilpatrick & Morrison, Atlanta, GA, Richard H. Gill, Copeland, Franco, Screws & Gill, Montgomery, AL, for petitioners-counterdefendants-appellees.

Appeal from the United States District Court for the Middle District of Georgia.

Before DUBINA, and CARNES, Circuit Judges, and FARRIS*, Senior Circuit Judge.

DUBINA, Circuit Judge:

This case involves an appeal from a contempt order entered by the district court against the Defendant-Appellant E.I. Du Pont de Nemours & Company ("DuPont"). For the reasons that follow, we reverse the district court's order and remand the case for further proceedings.

I. Background

This appeal has its origins in four consolidated cases, known collectively as the Bush Ranch litigation, that were tried before the district court in 1993. The primary issue at trial was whether Benlate 50 DF – a fungicide manufactured by DuPont and sold to the plaintiffs for use at their nurseries – was contaminated with highly toxic herbicides known as sulfonylureas ("SUs"). After the case was submitted to the jury, the plaintiffs in the Bush Ranch litigation offered to settle their claims, and DuPont agreed. Accordingly, on August 16, 1993, the plaintiffs in the Bush Ranch litigation voluntarily dismissed their claims with prejudice.

After the settlement, the plaintiffs in a Hawaii Benlate case requested documents related to testing of Benlate 50 DF from the Bush Ranch litigation. DuPont

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* Honorable Jerome Farris, Senior U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

resisted, but it eventually produced the documents pursuant to a court order. Among the test documents produced in the Hawaii Benlate case were certain raw test data (the "Alta data") that DuPont had not produced during the course of the Bush Ranch litigation. The Alta data included analytical findings which some experts would construe as evidence that Benlate 50 DF was contaminated with SUs.

As a result of the production of the Alta data in the Hawaii Benlate case, the Appellees[1] returned to the district court – more than a year and a half after the settlement of the Bush Ranch litigation – with a petition seeking sanctions against DuPont. The Appellees charged that DuPont had intentionally withheld evidence of SU contamination which was in its possession and which the district court had ordered it to produce. Furthermore, the petition charged that DuPont had falsely represented to the district court and to the Appellees that the Alta data it withheld contained no evidence of SU contamination. In response to the petition, the district court set a hearing date and ordered DuPont to appear and show cause why it should not be sanctioned.

DuPont filed a motion to recuse under 28 U.S.C. §§ 144 and 455, a motion to vacate the show cause order, and a motion to dismiss the Appellees' petition. The

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[1] The Appellees are the plaintiffs from three of the four cases consolidated in the original Bush Ranch litigation. Specifically, the Appellees consist of The Bush Ranch, Inc., William R. Lawson, Yellow River Growers, Roy Phillip Barber, Carol H. Barber, and C. Raker & Sons, Inc.

district court denied each of these motions and also dismissed DuPont's counterclaims against the Appellees. Following the district court's denial of the motion to recuse, DuPont filed a motion to stay the proceedings to enable it to seek writs of prohibition and mandamus from this court. The district court denied the motion to stay the proceedings, and this court subsequently denied DuPont's emergency motion for a stay and its petitions for writs of prohibition and mandamus.

The show cause hearing began on May 2, 1995, and continued through May 12, 1995. On the basis of the evidence presented at the hearing, the district court issued an order finding that DuPont's failure to produce the Alta data had violated its discovery orders in the Bush Ranch litigation. The district court specifically found that "DuPont deprived [the Appellees], the [district court], and the jury of data and documents highly relevant to the issue which DuPont itself described as the most critical issue in the case." *In re E.I. du Pont de Nemours & Co.*, 918 F.Supp. 1524, 1556 (M.D.Ga.1995). The district court also found that DuPont's conduct was "willful, deliberate, conscious, purposeful, deceitful, and in bad faith;" that this deceitful conduct "affected the rulings and the orders of [the district court] and interfered with the administration of justice;" and that this discovery abuse rendered the trial, which had lasted approximately six weeks, "a farce." *Id.*

Accordingly, the district court entered a sanctions order against DuPont consisting of the following four components:

(1) The district court directed DuPont to send copies of the sanctions order and the withheld documents to the Appellees and the rest of the plaintiffs in the Bush Ranch litigation.

(2) The district court found that the plaintiffs in the Bush Ranch litigation had together expended $6,843,837.53 in preparation for the trial and assessed a sanction in that amount against DuPont. The district court assessed another sanction for the same amount against DuPont to pay for the "wasted time, inconvenience, and waste of judicial resources inflicted upon [the district court] and the jury for the pretrial and trial of the consolidated cases." *Id.* at 1557. The district court ordered that the total sum – $13,687,675.06 – be paid into the registry of the court.

(3) The district court partially vacated the order entered upon settlement of the Bush Ranch litigation, thereby reinstating several orders finding discovery abuses by DuPont during the course of the trial. The district court specifically reinstated a conditional $1 million sanction it had imposed upon DuPont during the trial. The district court also assessed a sanction of $100 million against DuPont for its conduct during the previous litigation and during the show cause hearing. The district court announced that it would permit DuPont to purge itself of the $1 million and $100 million sanctions by complying with all other sanctions orders and by publishing a full page advertisement in the Wall Street Journal and in the most widely circulated newspapers in Alabama, Georgia, and Michigan acknowledging its wrongdoing and giving notice of the district

court's orders and sanctions. The form of the advertisement was to be submitted to the district court for its approval.

(4) The district court ordered DuPont to file, within 25 days, a certificate of compliance signed by DuPont's chief executive officer confirming that DuPont was in full compliance with the terms of the sanctions order. The district court warned DuPont that it would impose additional sanctions of $30,000 a day for each day after the termination of the 25-day grace period during which DuPont had not both fully complied with the sanctions order and filed the requisite certificate of compliance.

DuPont requested a stay of the sanctions order to enable it to appeal to this court. The district court granted the stay, and this appeal followed.

II. Issues Presented

In its effort to defeat the contempt order, DuPont presents three issues which we must discuss in order to decide this appeal.[2] First, DuPont argues that the district court lacked jurisdiction to entertain the proceedings which culminated in the issuance of the contempt order. Second, DuPont contends that the district court erred in imposing criminal contempt sanctions in a civil proceeding.[3] Third, DuPont claims that its failure to produce the Alta data violated no order of the district court.

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[2] We do not address the remaining issues raised by the parties, because our resolution of these first three issues is dispositive of this appeal.

[3] The district court invoked several sources of authority for imposing sanctions on DuPont. *See In re E.I. du Pont de Nemours*

III. Standards of Review

We review the district court's assertion of jurisdiction *de novo*. *See Mutual Assurance, Inc. v. United States*, 56 F.3d 1353, 1355 (11th Cir.1995). We also review *de novo* the district court's characterization of these proceedings as civil, and not criminal, in nature. *See International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, ___, 114 S.Ct. 2552, 2561-63, 129 L.Ed.2d 642 (1994); *Martin v. Guillot*, 875 F.2d 839, 845 (11th Cir.1989). As will be discussed *infra*, DuPont's challenge to the existence of an order requiring production of the Alta data presents a question of evidence sufficiency which we review *de novo*. *See United States v. Keller*, 916 F.2d 628, 632 (11th Cir.1990), *cert. denied*, 499 U.S. 978, 111 S.Ct. 1628, 113 L.Ed.2d 724 (1991).

IV. Discussion

A. Jurisdiction.

DuPont argues that the district court "lacked jurisdiction to entertain an independent civil action for sanctions

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& Co., 918 F.Supp. at 1540-41. However, we are persuaded that none of these sources of authority could support the sanctions order without the assistance of the district court's inherent contempt power – a fact that the Appellees themselves recognize. *See* Appellees' Br. at 24 ("Having jurisdiction, and because no single rule was up to the task, the [district court] properly relied on its inherent powers to sanction DuPont.") (emphasis added). Thus, we need examine only the constitutionality of the district court's exercise of its inherent contempt power to determine whether the sanctions order can stand.

based on alleged misconduct in the long-dismissed Bush Ranch litigation." DuPont's Br. at 17. We disagree. Every district court "has the power to conduct an independent investigation in order to determine whether it has been the victim of fraud." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44, 111 S.Ct. 2123, 2132, 115 L.Ed.2d 27 (1991) (citing *Universal Oil Prods. Co. v. Root Ref. Co.*, 328 U.S. 575, 66 S.Ct. 1176, 90 L.Ed. 1447 (1946)). In addition, the district court was free to vacate its earlier judgment, in whole or in part, and to resume proceedings on the same jurisdictional basis as it possessed in the underlying case. *See Chambers*, 501 U.S. at 44, 111 S.Ct. at 2132 ("Of particular relevance here, the inherent power also allows a federal court to vacate its own judgment upon proof that a fraud has been perpetrated upon the court.") (citing *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1994); *Universal Oil*, 328 U.S. at 580, 66 S.Ct. at 1179). For this reason, the Supreme Court has specifically held that "[a] court may make an adjudication of contempt and impose a contempt sanction even after the action in which the contempt arose has been terminated." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396, 110 S.Ct. 2447, 2456, 110 L.Ed.2d 359 (1990) (citations omitted). Thus, we conclude that the district court possessed jurisdiction to conduct the challenged proceedings.

B. Nature of the Sanctions.

DuPont contends that the district court committed reversible error in imposing criminal sanctions in a civil proceeding. It is indisputable that the district court did

not afford DuPont the procedural protections the Constitution requires for the imposition of criminal contempt sanctions.[4] Thus, the proceedings were civil in nature, and DuPont's entitlement to relief on appeal turns on our characterization of the contempt order as being either civil or criminal in nature. *See Blalock v. United States*, 844 F.2d 1546, 1560 n. 20 (11th Cir.1988) (per curiam) (Tjoflat, J., specially concurring) ("It requires no citation of authority to say that a district court may not, even unwittingly, employ a civil contempt proceeding to impose what, in law, amounts to a criminal contempt sanction . . . . When a district court employs civil contempt procedures to punish a contemner, it necessarily deprives the contemner of his constitutional rights and renders his contempt citation a nullity.").

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[4] The Supreme Court summarized these requirements in the following passage:

> [T]his Court has found that defendants in criminal contempt proceedings must be presumed innocent, proved guilty beyond a reasonable doubt, and accorded the right to refuse to testify against themselves; must be advised of charges, have a reasonable opportunity to respond to them, and be permitted the assistance of counsel and the right to call witnesses; must be given a public trial before an unbiased judge; and must be afforded a jury trial for serious contempts.

Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 798-99, 107 S.Ct. 2124, 2133, 95 L.Ed.2d 740 (1987) (citing *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed. 797 (1911); *Cooke v. United States*, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767 (1925); *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948); and *Bloom v. Illinois*, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968)).

The Supreme Court has instructed that "conclusions about the civil or criminal nature of a contempt sanction are properly drawn, not from the subjective intent of [the court imposing the sanction], but from an examination of the character of the relief itself." *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, ___, 114 S.Ct. 2552, 2557, 129 L.Ed.2d 642 (1994) (citation and internal quotation marks omitted). If the relief is designed to compensate a complainant for losses or to coerce a party into complying with a court order, the contempt sanction is civil in nature. *See id.*, 512 U.S. at ___, 114 S.Ct. at 2558; *Martin v. Guillot*, 875 F.2d 839, 845 (11th Cir.1989). By contrast, "if a court seeks to vindicate its authority by punishing a contemnor, then [the] contempt is criminal in nature." *Martin*, 875 F.2d at 845 (citations omitted). Thus, we must determine whether the specific sanctions ordered by the district court were compensatory and coercive in nature, or instead were punitive in nature.

We have little trouble concluding that the sanctions the district court imposed were overwhelmingly punitive – and thus criminal – in nature. First, there was no compensatory aspect to the contempt order. The only provision even arguably geared toward compensation of the parties was the first command that DuPont pay a sum of $6,843,837.53. Although the district court chose this figure because it represented the cost to the plaintiffs in preparing for and conducting the underlying trial, the district court did not order that this sum be paid to the Appellees or to any of the other plaintiffs in the original Bush Ranch litigation. Instead, the district court ordered the sum to be paid into the registry of the court. The

Supreme Court has provided few "straightforward rules" for distinguishing between civil and criminal contempts, *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 631-32, 108 S.Ct. 1423, 1429, 99 L.Ed.2d 721 (1988), but it has held that "[i]f the relief provided is a fine, it is remedial [and thus civil in nature] when it is paid to the complainant, and punitive when it is paid to the court. . . . " *Id.*, 485 U.S. at 632, 108 S.Ct. at 1429. Thus, under Hicks, this portion of the sanctions order must be characterized as punitive in nature.

Second, there was no coercive aspect to the district court's contempt order.[5] At the time the district court entered the contempt order, DuPont could no longer comply with the discovery orders because the Bush Ranch litigation had terminated. Although the district court did have the power to set aside the settlement agreement and re-open the discovery portion of the earlier case, *see Chambers v. NASCO, Inc.*, 501 U.S. 32, 44, 111 S.Ct. 2123, 2132, 115 L.Ed.2d 27 (1991), it chose not to do so. Where "the contemnor [can] not avoid the sanction by agreeing

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[5] The final section of the contempt order was clearly intended to coerce DuPont into complying with the order's three other sections. Thus, when considered in isolation, this part of the order could be characterized as a coercive civil sanction. However, because it was intended to coerce compliance with the other sanctions, which were punitive in nature, it must fall with the rest of the contempt order. *See Hicks*, 485 U.S. at 638 n. 10, 108 S.Ct. at 1433 n. 10 ("[I]f both civil and criminal relief are imposed in the same proceeding, then the criminal feature of the order is dominant and fixes its character for purposes of review.") (citations and internal quotation marks omitted).

to comply with the original order to produce the documents," the sanctions order is determinate and therefore criminal in nature.[6] *Hicks*, 485 U.S. at 634 n. 6, 108 S.Ct. at 1431 n. 6.

We are persuaded that the sanctions imposed by the district court were neither compensatory nor coercive in nature, but instead were designed to punish DuPont for flouting the authority of the district court. Accordingly, even though DuPont and its counsel may very well have engaged in criminal acts,[7] we must reverse the contempt order because the district court did not afford DuPont the procedural protections the Constitution requires for the imposition of criminal contempt sanctions.

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[6] There is an exception to the general rule that determinacy of sanctions renders them criminal rather than civil in nature, and the Appellees argue that the exception applies in this case. In Hicks, the Court stated that "[i]f the relief imposed . . . is in fact a determinate sentence with a purge clause, then it is civil in nature." *Hicks*, 485 U.S. at 640, 108 S.Ct. at 1433 (citations omitted). The Appellees claim that the $1 million and $100 million sanctions contained in the third part of the contempt order are civil in nature because, even though determinate, DuPont was free to purge them by taking out ads in several newspapers confessing wrongdoing. But this publication option was itself neither compensatory nor coercive, but instead was punitive in nature. When a party must choose between two sanctions that are both punitive in nature, the character of the ultimate relief will necessarily be punitive.

[7] In light of the serious nature of the allegations against DuPont and its counsel, we assume that the appropriate United States Attorney will shortly begin an investigation of this matter (if he or she has not already done so).

C. Violation of an Order.

DuPont claims that it "cannot be held in contempt for failing to produce the Alta [data] for the simple reason that there was no order requiring [their] production." *DuPont's Br.* at 17. If DuPont is correct in its assertion that it was never ordered to produce the Alta data, then it cannot be held in contempt for failing to produce the Alta data during the Bush Ranch litigation. Since a ruling on this issue will either confirm or remove permanently a risk of the imposition of serious criminal contempt sanctions against DuPont, we now turn to a discussion of whether the evidence that DuPont was ever ordered to produce the Alta data is sufficient to allow this case to proceed further.

As previously explained, the sanctions imposed by the district court were criminal in nature. In the context of criminal contempt, the existence vel non of an order is a question for the finder of fact. *See United States v. Turner*, 812 F.2d 1552, 1563 (11th Cir.1987) (listing, as one of the essential elements of criminal contempt, a finding that the district court "entered a lawful order of reasonable specificity"); *see also In re McDonald*, 819 F.2d 1020, 1024 (11th Cir.1987) (holding that whether an order is reasonably specific is a question of fact which must be proven beyond a reasonable doubt to sustain a conviction for criminal contempt). Thus, in order to grant DuPont's request that we declare at this stage of the proceedings that no order requiring production of the Alta data existed, we would have to find that the record contains insufficient evidence to enable a reasonable finder of fact to conclude beyond a reasonable doubt that the district court entered a lawful order of reasonable specificity

requiring DuPont to produce the Alta data. An order meets the "reasonable specificity" requirement only if it is a "clear, definite, and unambiguous" order requiring the action in question. *See, United States v. Koblitz*, 803 F.2d 1523, 1527 (11th Cir.1986); *Jordan v. Wilson*, 851 F.2d 1290, 1292 n. 2 (11th Cir.1988); *see also Int'l Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76, 88 S.Ct. 201, 208, 19 L.Ed.2d 236 (1967) (union could not be held in contempt for violating order which did not clearly apply to union).

Mindful of this standard, and having undertaken a thorough review of the record, we cannot agree with DuPont that there is insufficient evidence from which a reasonable finder of fact could conclude that there was a reasonably specific order requiring DuPont to produce the Alta data. In reaching this conclusion, we have applied the familiar doctrine that the evidence is to be viewed, and all credibility issues to be decided, in the light most favorable to the charge, and all reasonable inferences drawn in support of a guilty verdict. *See, e.g., Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2788, 61 L.Ed.2d 560 (1979); *United States v. Starrett*, 55 F.3d 1525, 1541 (11th Cir.1995); *United States v. Perez*, 956 F.2d 1098, 1101 (11th Cir.1992). Of course, we do not mean, by our ruling on this issue, to predetermine the outcome of the criminal contempt proceeding. More specifically, we do not mean to intimate that no reasonable finder of fact could have a reasonable doubt about the existence of a sufficiently specific order. Rather, we merely hold that the record contains sufficient evidence from which a reasonable finder of fact could find beyond a reasonable doubt

that DuPont was ordered to produce the Alta data. We turn now to a discussion of that evidence.

The plaintiffs' first request for document production was very broad. In it, DuPont was asked to produce, inter alia:

> All documents reflecting, referencing, and/or relating to any analytical findings (including identification of peaks) from mass spectrometry [and] high performance liquid chromatography . . . in any way relating to the use and/or administration of Benlate 50 DF;
>
> * * *
>
> all documents reflecting, referencing, and/or relating to any assays . . . conducted, in whole or in part, for the purpose of determining the presence, if any, of any sulfonylurea compound in Benlate 50 DF; [and]
>
> * * *
>
> all documents relating to and/or referencing any report or finding from any person, or entity, whether or not employed by the defendant, of other pesticidal compounds, including, but not limited to, herbicides, in Benlate 50 DF.

Plaintiffs' First Request for Production of Documents to Defendant E.I. du Pont de Nemours & Company ¶¶ 18, 55, and 65. The Alta data consist of documentation of the results of liquid chromatography testing which was done to detect the possible presence of Benlate 50 DF in soils taken from the plaintiffs' nurseries. Thus, the request for production of documents would appear to cover the Alta data. Nevertheless, DuPont argues that this request for production of documents could not include the Alta data,

both because the district court treated materials generated by non-testifying experts differently from materials generated by testifying experts and non-experts, and because the Alta data were generated long after the first request for production of documents was prepared. These arguments are not strong enough to establish DuPont's position as a matter of law; a reasonable factfinder could reject them.

There is no phrase in the request for document production suggesting that the plaintiffs intended or desired for the request to be limited to documents produced by testifying experts or by non-experts. In addition, there is no phrase in the request suggesting that the plaintiffs intended or desired the request to be limited to documents in existence on or before the date DuPont received the document request.[8] Thus, a reasonable finder of fact

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[8] Although one might intuitively think that the request for production contains an implicit limitation to documents produced on or before the date the request for production was issued, there is the following language in Rule 26:

> A party who has . . . responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:
>
> > (1) . . . if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

could conclude beyond a reasonable doubt that this request, on its face, covered the Alta data.

DuPont raised a number of objections to this request for production, each of which was subsequently overruled by the district court. In particular, DuPont claimed that it was not required to turn over the requested documents because the discovery request sought "information or materials which have been gathered or prepared in anticipation of or in the course of litigation, or which otherwise is subject to [the] work-product doctrine." Memorandum Opinion and Order on Plaintiffs' Motion to Compel Discovery Dated June 24, 1992, at 3. The district court noted that DuPont had failed to make timely and specific claims of privilege and specifically overruled DuPont's "objections to producing documents involving Benlate claims and lawsuits and tests that Defendant has conducted since March, 1991." *Id.* at 17 (emphasis added). Nevertheless, the district court reserved ruling on DuPont's claims of work product protection to give DuPont yet another opportunity to present adequately its claims of privilege on or before June 30, 1992. In addition, the district court specifically ordered DuPont to go back and review the plaintiffs' first request for production of documents and to answer each request fully within 15 days from the date of the district court's order. *See id.* at 18.

Fed.R.Civ.P. 26(e) (emphasis added). Thus, when a party generates responsive documents which render incomplete or incorrect earlier disclosures, it has an obligation to inform the opposing party of the new material.

On June 30, 1992, DuPont filed a 498-page privilege log with the district court listing documents that it wanted to withhold on grounds of attorney-client privilege and/or the work product doctrine. *See* Supplemental Order Dated September 25, 1992, at 3. DuPont also noted its intention to withhold four categories of documents that were not individually logged. One of these categories of non-individually logged documents was described as "documents generated during ongoing testing conducted in 1992 by defendant with outside experts retained to evaluate crop damage claims and to determine the causes of damage." *Id.* The district court then made the following statement:

> This Court concludes that defendant's expressed intent to raise additional claims of such privileges and protections, long after its responses to plaintiffs' first interrogatories and plaintiffs' first request for production were due and long after the June 30, 1992, date upon which this Court directed defendant to file a detailed log specifically setting forth any and all claims of attorney-client privilege and work-product protection, is contrary to applicable law as set forth above and in violation of this Court's directives.

Id. at 21. The district court further stated:

> [T]he Court has determined that management of these cases, consolidated for the purpose of discovery, must not be further delayed by the non-production of documents by this defendant, nor by a continued delayed filing of claims of attorney-client privilege and work-product protection. The consequences to this defendant, if any, resulting from the rulings herein made, will result solely from the failure of this defendant to

> respond timely to the plaintiffs' ~~discovery~~ requests.

Id. at 26 (emphasis added).

As a result of DuPont's refusal to review its documents and make adequate claims of work product protection, the district court issued an order to apply throughout the Bush Ranch litigation that no further claims of work product protection asserted by DuPont would be entertained unless DuPont made a showing of extraordinary need. *Id.* at 27-28 ("The matter here considered will be limited to the question of the plaintiffs' first discovery requests directed to the defendant and the question of whether the defendant, by its acts and conduct, has waived the right to file any further claims of attorney-client privilege or work-product protection as to individual documents responsive to those discovery requests. . . . Only an assertion of privilege by defendant upon a showing of extraordinary need will be hereafter considered.") (emphasis added). Thus, a reasonable finder of fact could conclude beyond a reasonable doubt that the district court, by order, specifically altered the general process contained in Rule 26 for addressing claims of work product protection relating to documents prepared by DuPont in anticipation of litigation.[9]

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[9] The procedure adopted by the district court – viz., requiring the non-producing party to identify documents withheld under a claim of work product protection before forcing the party seeking production to make a showing of substantial need for the documents – is substantially in line with an amendment to Rule 26 adopted shortly after the termination of the Bush Ranch litigation. *See* Fed.R.Civ.P. 26(b)(5) ("When a party withholds information otherwise discoverable under

As a result of DuPont's abuse of the discovery process, the district court set up a special procedure for reviewing future work product claims by DuPont. A reasonable finder of fact could well conclude that DuPont's attorneys were clever enough to figure out the import of the district court's enunciated procedure for reviewing all future claims of work product protection in the case. Indeed, after the district court adopted this procedure, it specifically ordered DuPont to go back and review its responses to the plaintiffs' first request for document production and to fill in immediately "all gaps in documents responsive to Plaintiffs' original discovery requests." Order Imposing Sanctions Dated March 15, 1993, at 4 (emphasis added). Significantly, the Alta data were generated only a couple months after the district court issued its gap-filling order.

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these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection."). Arguably, the content of subdivision (b)(5) was already implicit in the scheme of Rule 26 at the time of the Bush Ranch litigation. At any rate, the question before this court is not what the Federal Rules of Civil Procedure required DuPont to produce, but instead what a reasonable finder of fact could conclude that the district court ordered DuPont to produce. If the district court's order to produce the documents sought in the first request for document production was clear, then DuPont was not entitled to decide unilaterally to disregard the order simply because it did not track precisely the procedure set up in Rule 26.

We do recognize that there is evidence in the record which could cause a factfinder to have a reasonable doubt about the existence of a clear, definite, and unambiguous order requiring DuPont to produce the Alta data. For example, DuPont points to a joint motion, signed by plaintiffs' lead counsel and submitted to the district court upon settlement of the case which states that "Plaintiffs have agreed that, during the course of the case, DuPont did come in compliance with the Court's Orders and its discovery obligations." Joint Motion and Supporting Memorandum of Plaintiffs and Defendant for an Order Vacating Prior Discovery Orders and Sanctions Dated August 16, 1993, at 3. As noted by DuPont, it is undisputed that Neal Pope, the lead counsel for the plaintiffs, signed that joint motion at a time when he knew that the Alta data had not been turned over during the course of discovery. We agree with DuPont that Mr. Pope's written representation, as an officer of the court, that DuPont had complied with its discovery obligations is evidence in its favor. But it is not conclusive evidence.

A factfinder is entitled to make credibility determinations, and we are not prepared to rule out the possibility that a reasonable factfinder might find that, notwithstanding his obligations as an officer of the court, Mr. Pope's representations were less than literally true and were made as a matter of expedience to ensure the success of the settlement. We hope that expedience and deliberate misrepresentation is not the explanation; if, however, that turns out to be the case, the district court should take appropriate action. It may be that there is a satisfactory, innocent explanation for the inconsistency between Mr. Pope's representations to the district court

on behalf of the plaintiffs in the settlement agreement, and the position plaintiffs have taken in this proceeding, but we leave that matter to further development upon remand. The district court should insist upon an explanation, and the factfinder can make the necessary credibility determinations about any explanation that is offered.

For present purposes, it is enough to view all of the evidence, make all of the credibility decisions, and draw all of the reasonable inferences in favor of the contempt charge. Doing that, we conclude that a reasonable finder of fact could conclude beyond a reasonable doubt that the plaintiffs' first request for production of documents covered the Alta data. In addition, a reasonable finder of fact could conclude beyond a reasonable doubt that the district court overruled DuPont's objections to that request and ordered DuPont to produce the Alta data. In sum, we hold that a reasonable finder of fact could conclude beyond a reasonable doubt that the district court entered a lawful order of sufficient specificity commanding DuPont to produce the Alta data and that it willfully failed to obey that order.

V. Conclusion

For the foregoing reasons, we reverse the contempt order and remand this case to the district court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

KAWAMATA FARMS, INC.,
Plaintiff-Appellee,

v.

UNITED AGRI PRODUCTS, Loveland Industries, Inc., dba United Agri Products (Hawaii); Reginald Hasegawa, E.I. DuPont de Nemours & Company, a Delaware corporation; Terra International, Inc., a Delaware corporation; Platte Chemical Co., a Nebraska corporation; Bartlo Packaging, a New Jersey corporation, Defendants-Appellants.

Stanley T. TOMONO and Cynthia T. Tomono dba S.T.T. Farms, Plaintiffs-Appellees-Counter-Defendants-Counter-Appellees,

v.

E.I. DuPONT DE NEMOURS & COMPANY, a Delaware corporation; Terra International, Inc., a Delaware corporation; Platte Chemical Co., a Nebraska corporation; Bartlo Packaging, Incorporated, a New Jersey corporation; Loveland Industries, Inc., dba in Hawai'i as Loveland Industries, Inc., United Agri Products Hawaii,
Reginald Hasegawa, Defendants-Appellants-Cross-Defendants-Cross-Appellees,

and

Kristofer Knutsen; Inger-Lise Knutsen; Bernard H.F. Chun; Marion Bush, Trustee of the Marion Pualani Keliikipi Bush Trust, Defendants-Appellants-Cross-Claimants-Cross-Appellants-Counter-Claimants-Counter-Appellants.

No. 19201.

Supreme Court of Hawai'i.

Dec. 11, 1997.

Edward W. Warren, Christopher Landau, Washington, DC, and James Gash, Los Angeles, CA, of Kirkland & Ellis, for appellants E.I. DuPont de Nemours and Company, Inc. and Bartlo Packaging Incorporated.

John R. Lacy, Lisa W. Munger and Bruce L. Lamon of Goodsill Anderson Quinn & Stifel, Honolulu, for appellants E.I. DuPont de Nemours and Company, Inc. and Bartlo Packaging Incorporated.

John S. Nishimoto and Calvin Young of Ayabe, Chong, Nishimoto, Sia & Nakamura, Honolulu, for appellants United Agri Products, Loveland Industries, Inc., United Agri Products (Hawaii), Reginald Hasegawa, and Platte Chemical Co.

William A. Bordner and David Gruebner of Burke Sakai McPheeters & Bordner, Honolulu, for appellant Terra International, Inc.

Stanley H. Roehrig, Andrew P. Wilson, Stephen T. Cox and Kris A. LaGuire of Roehrig, Roehrig, Wilson & Hara, Hilo, and Peter Van Name Esser, Honolulu, for appellees Kawamata Farms, Inc., Stanley T. Tomono and Cynthia T. Tomono dba S.T.T. Farms.

Stephen D. Whittaker and David W. Lacy of The Law Offices of Stephen D. Whittaker, Kailua Kona, for cross-appellants Kristofer Knutsen, Inger-Lise Knutsen, Bernard H.F. Chun, and Marion Bush, Trustee.

Before MOON, C.J., and KLEIN, LEVINSON, NAKAYAMA and RAMIL, JJ.

NAKAYAMA, Justice.

In this products liability lawsuit, defendants-appellants-cross-defendants-cross-appellees E.I. DuPont de Nemours and Company, Terra International, Inc., Platte Chemical Co., Bartlo Packaging, Inc., United Agri Products, Loveland Industries, Inc., United Agri Products (Hawaii), and Reginald Hasegawa appeal from a judgment awarding plaintiffs-appellees Kawamata Farms, Inc. and plaintiffs-appellees-counter-defendants-counter-appellees Stanley T. Tomono, and Cynthia T. Tomono a total of more than $23 million in damages for crop damage resulting from a manufacturing defect in Benlate 50 DF and Benlate 50 WP, which are agricultural fungicides. Defendants-appellants-cross-claimants-cross-appellants-counter-claimants-counter-appellants Kristofer and Inger-Lise Knutsen, Bernard H.F. Chun, and Marion Bush also appeal from unfavorable jury verdicts in a declaratory action against them, as well as their counterclaims and cross-claims. For the reasons stated below, we affirm the judgment and all of the circuit court's orders.

I. BACKGROUND

A. The Parties

This appeal results from two separate products liability lawsuits that were consolidated for trial. Kawamata Farms, Inc. (Kawamata Farms) is a Hawai'i corporation that produces, distributes, markets, and sells ornamental flowers, including roses, in Hawai'i County. Stanley T.

Tomono and Cynthia T. Tomono (the Tomono Plaintiffs) own and operate S.T.T. Farms, a business that grows, markets, and distributes tomatoes, cucumbers, orchids, and various other agricultural products in Hawai'i County.

Kawamata Farms and the Tomono Plaintiffs (referred to collectively as the Plaintiffs) filed their actions in 1991 and 1992, respectively, alleging that their plants, soil, and farm structures had been damaged by Benlate 50 DF and Benlate 50 WP (referred to collectively as Benlate), which are agricultural fungicides that were manufactured by E.I. DuPont de Nemours and Company (DuPont). The Plaintiffs sued DuPont, Terra International, Inc., Platte Chemical Co., Bartlo Packaging, Inc., United Agri Products, Loveland Industries, Inc., United Agri Products (Hawaii), and Reginald Hasegawa (referred to collectively as the Liability Defendants), who were involved in formulating, manufacturing, packaging, marketing, distributing, and/or selling of Benlate. The Plaintiffs sought compensatory damages under, among other things, theories of negligence and strict products liability, and breach of express warranty. The Plaintiffs also sought punitive damages.

Because the Tomono Plaintiffs had leased some of their farm land from various landlords, the Tomono Plaintiffs sought declaratory relief from the landlords to absolve themselves of responsibility for any alleged damage to the land. Two of the Tomono Plaintiffs' landlords, the State of Hawai'i and the Trustees under the Will and of the Estate of Bernice Pauahi Bishop (Bishop Estate), successfully sought dismissal from the case. The remaining landlords, Kristofer and Inger-Lise Knutsen, Bernard

H.F. Chun, and Marion Bush (hereinafter referred to collectively as the Declaratory Defendants), filed a counterclaim against the Tomono Plaintiffs, alleging breach of contract, negligence, and waste. The Declaratory Defendants also filed a cross-claim against the Liability Defendants, essentially adopting the Plaintiffs' causes of action against the Liability Defendants, and seeking compensatory damages for soil remediation, as well as punitive damages.

The Plaintiffs' two lawsuits were consolidated on November 16, 1993, and trial was set for June 14, 1994. As explained below, at the conclusion of the trial, the jury issued a verdict in favor of the Plaintiffs and against the Liability Defendants, finding liability under Counts I and II, in which the Plaintiffs had alleged negligence liability and strict liability, respectively, for the defective manufacture or design of Benlate. The jury also found liability under Count III for the Liability Defendants' breach of an express warranty on the label of Benlate.

With respect to the Tomono Plaintiffs' declaratory action and the Declaratory Defendants' counterclaim and cross-claims, the jury rendered a verdict in favor of the Plaintiffs and Liability Defendants, and against the Declaratory Defendants.

B. The Recall of Benlate 50 DF

The Liability Defendants formulated, manufactured, packaged, marketed, distributed, and/or sold Benlate 50 DF, a fungicide that the Plaintiffs applied to their plants and soil. On September 1, 1989, the federal Environmental Protection Agency (EPA) issued a stop sale order that,

at least temporarily, prohibited DuPont from selling certain lots of Benlate 50 DF because they were contaminated with the herbicide atrazine. Benlate 50 DF was deemed adulterated, and its sale constituted an unlawful act under the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C.A. §§ 136-136y (1992) (FIFRA). In March 1991, the EPA issued a second stop sale order prohibiting DuPont from selling atrazine-contaminated Benlate 50 DF. Benlate 50 DF was again deemed adulterated, and its sale, again, constituted an unlawful act under the FIFRA. On March 22, 1991, DuPont instituted a total recall of Benlate 50 DF, after which DuPont no longer sold Benlate 50 DF in the United States.

C. Pre-Trial Motions

Before trial, DuPont and the other Liability Defendants moved for partial summary judgment, asserting that the FIFRA preempted several of the Plaintiffs' claims. In particular, the Liability Defendants contended (1) that the FIFRA's federal regulatory scheme governing the warnings set forth on pesticide labeling and packaging prohibited state law from imposing additional warning requirements on labels and, thus, (2) that the FIFRA preempted the Plaintiffs' claims. The circuit court partially granted the Liability Defendants' motion for partial summary judgment regarding FIFRA preemption issues, dismissing the Plaintiffs' negligence and strict liability claims in Counts I and II to the limited extent that those claims related to inadequacies in the labeling and packaging of Benlate.

However, the circuit court did not grant the Liability Defendants' motion for partial summary judgment regarding preemption to the extent that the Plaintiffs were alleging liability in Counts I and II for the defective manufacture and design of Benlate. Furthermore, the circuit court expressly denied the Liability Defendants' motion for partial summary judgment regarding preemption issues with respect to the Plaintiffs' claim for breach of express warranty in Count III.

The Liability Defendants also moved for partial summary judgment to the extent that the Plaintiffs' express warranty claim in Count III sought to recover damages in excess of the limitation of liability provision within the express warranty on the Benlate label, which the circuit court denied. In denying this motion, the circuit court stated that "[t]he Court finds as a matter of law that the Benlate products warranty disclaimers and limitation of remedies provisions are unconscionable under the facts of this case." As a result of this ruling, the circuit court eventually instructed the jury to disregard the limitation of liability provision within the express warranty on the Benlate label.

The Liability Defendants moved several times to have the circuit court realign the Declaratory Defendants as plaintiffs. The circuit court denied these motions, because it found that the Declaratory Defendants were adverse to the Tomono Plaintiffs. As a result, during jury selection, the Liability Defendants had six of the defense's eight total peremptory challenges, and the Declaratory Defendants had the other two.

D. Discovery

Discovery in this matter was very contentious. As the manufacturer of Benlate, DuPont had exclusive possession and control of the vast majority of documents relating to the defects in Benlate. The Plaintiffs' discovery requests sought hundreds of thousands of documents, including documents that DuPont claimed were privileged. In response to some of DuPont's objections, the Plaintiffs accused DuPont of stonewalling. From the commencement of discovery in November 1992, until the post-trial issuance of an amended punitive sanction order on May 16, 1995, the circuit court issued fifty-four discovery orders against DuPont. Of those fifty-four discovery orders, twenty-seven imposed sanctions for discovery violations. Five of the orders contained findings that DuPont had intentionally withheld material evidence from the Plaintiffs. DuPont challenged the circuit court's discovery and other pre-trial orders by filing three petitions for writs of mandamus in this court in Case Nos. 17369, 17834, and 18004, which we denied.

E. The Trial

The trial lasted seven months, from June 1994 to January 1995. The crux of the Plaintiffs' case was that a defect in Benlate had injured their plants, soils, and farm structures. The Plaintiffs asserted that: (1) Benlate had been contaminated with atrazine and sulfonylureas, which are herbicides, when the Liability Defendants manufactured it; and (2) the benomyl in Benlate produced phytotoxic substances called butyl isocyanate and/or

dibutylurea. Because of these defects, the Benlate caused crop damage.

One of the controversies occurred during opening statements, when the Plaintiffs' counsel made a brief reference to a verdict against DuPont in another case entitled *Peterson Brothers, Inc. v. E.I. DuPont De Nemours and Co. and Greenlight Chemical Co.*, Case No. 91-CI-12100, 24th Judicial District Court of Bexar County, Texas. Following an objection, counsel for the Liability Defendants moved for a mistrial. After hearing the parties' arguments regarding the relevancy of the verdict to the instant case, the circuit court denied the motion.

There were at least three major discovery disputes during the trial, which occurred when Plaintiffs' counsel discovered relevant documents showing herbicide contamination of Benlate at numerous farms where Benlate had been applied. In each of these three major discovery disputes, DuPont had failed to either produce or properly identify documents in response to previous discovery requests and circuit court orders.

For example, during the trial in late July 1994, the Plaintiffs moved for sanctions against DuPont based upon their discovery of the deposition testimony of a DuPont employee, Dennis Keeler (Keeler), in a Benlate-related case in Florida entitled *Smith v. DuPont*, Case No. 92-240-CA, Third Circuit Court, Florida. At that deposition on June 8 and 9, 1994, Keeler had been shown a document that summarized the results of Benlate testing that DuPont had carried out or commissioned. Upon review of the document, Keeler had testified that the Benlate-testing summary appeared to be accurate. Keeler

identified three sets of documents as containing nearly one hundred percent of all contamination test results of Benlate 50 DF. However, in the instant case, DuPont had not identified these Benlate test results in response to previous circuit court orders. As a result, the Plaintiffs moved for sanctions against DuPont, requesting, among other things, that the circuit court admit into evidence the Benlate-testing summary, an 84-page summary of contamination test results for Benlate DF manufactured from 1987 to 1991 (hereinafter referred to as Exhibit P-9369A). The circuit court granted the Plaintiffs' request to admit Exhibit P-9369A into evidence.

Several months later, Exhibit P-9369A became the source of the second major discovery dispute. When Keeler took the witness stand in the instant case in November 1994, the Plaintiffs showed him Exhibit P-9369A, and Keeler again vouched for its overall accuracy. However, the following month, nine days before the trial's conclusion, Plaintiffs discovered that, during yet another deposition in the Florida case, Keeler had produced a stack of documents that included four pages of Benlate test results that had not been included in Exhibit P-9369A. In response, the Plaintiffs again moved for sanctions against DuPont, arguing that DuPont had intentionally withheld those test results from the Plaintiffs. The circuit court agreed with the Plaintiffs that sanctions were appropriate because DuPont had not properly identified and produced the test results in response to the Plaintiffs' interrogatories. Accordingly, the circuit court sanctioned DuPont by, among other things, (1) allowing plaintiffs to introduce the four pages of test results into evidence in the trial as Plaintiffs' Exhibit K-41, and (2)

allowing the Plaintiffs' counsel to read to the jury selected excerpts from Keeler's December 1994 Florida deposition testimony.

The third major discovery dispute during trial involved documents relating to scientific testing that Alta Analytical Laboratory, Inc., (Alta) had performed on DuPont's behalf in response to other Benlate-related litigation. Alta's testing sought to determine the validity of many Benlate-related claims nationwide regarding soil contamination resulting from Benlate application. Earlier in this case, DuPont had agreed to provide the Plaintiffs with the Alta test results relating to their own soils, but DuPont had invoked the work-product privilege with respect to the Alta test results relating to the soils of plaintiffs in other Benlate cases. Acting upon the recommendation of a discovery master, retired Judge Frank T. Takao (Discovery Master Takao), the circuit court ordered DuPont to produce the Alta test results (Alta documents) relating to all the other Benlate cases, subject to protective orders prohibiting Plaintiffs' counsel from distributing the Alta documents to plaintiffs' counsel in other Benlate cases. DuPont sought emergency review of the circuit court's decision compelling production of the Alta documents by petitioning this court for a writ of mandamus, but, in Case No. 17834, we denied the petition without prejudice.

The discovery dispute involving the Alta documents erupted in October 1994, during the defense phase of the trial, when the plaintiffs in a Benlate-related case in

Texas[1] obtained six boxes of Alta documents, including material relating to testing of soils for Benlate contamination, that DuPont had failed to produce in the instant case in response to the Plaintiffs' previous discovery requests. The Plaintiffs discovered this fact and moved for sanctions against DuPont, alleging that DuPont should have previously produced all of these Alta documents during the discovery phase of this litigation pursuant to circuit court order. In response, the circuit court granted the Plaintiffs' motion for sanctions. The circuit court specifically found that DuPont's non-production of the Alta documents was intentional. As a sanction, the circuit court allowed the Plaintiffs to recall their principal causation witness, Dr. Jodie Johnson, to the stand to present his interpretation of the Alta documents to the jury, and the circuit court barred DuPont's experts from offering any subsequent rebuttal testimony in response to Dr. Johnson's testimony; however, the Liability Defendants were allowed to use the depositions of two of DuPont's expert witnesses, Robert Betham and Robert Peterson, in cross-examining Dr. Johnson. In addition, because DuPont had violated a previous court order imposing sanctions against DuPont, the circuit court announced its intention to impose an additional punitive sanction against DuPont at a later date.

After the Liability Defendants rested, but prior to closing arguments, the circuit court held a hearing on the punitive sanctions on January 19, 1995. Finding that

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[1] Although both the Plaintiffs and the Liability Defendants referred to this Benlate-related case in Texas, neither of them provided the title of this particular case.

DuPont had intentionally withheld information and documents that it should have produced during discovery, the circuit court sanctioned DuPont by, among other things, (a) ordering DuPont to pay a $1.5 million fine to the State of Hawai'i, (b) lifting previous protective orders concerning the confidentiality of DuPont documents, with the exception of those documents that contained trade secrets, and (c) declaring that the circuit court would give the jury remedial instructions reflecting DuPont's discovery misconduct and explaining that Dr. Jodie Johnson was recalled in the Plaintiffs' case to testify regarding information that DuPont had withheld from the Plaintiffs. In its order, issued March 7, 1995, the circuit court stated the following:

> IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:
>
> 1. The Court has considered the history of discovery in this case, the numerous motions to compel filed by Plaintiffs, and the remedial sanctions this Court has progressively imposed on Defendant Du Pont after finding that Du Pont intentionally withheld information and documents that should have been produced during discovery.
>
> 2. The Court has also considered the statements made by Judge Elliot and other Judges throughout the United States regarding Benlate litigation which is the subject of this lawsuit.
>
> 3. The Court would note that there is no dispute that other Judges on the record have made strong statements to Du Pont regarding discovery abuse.

4. Of concern to the Court is the Dennis Keeler deposition which was held in June, 1994 on the mainland and this Court's subsequent Order receiving Exhibit P-9369A in evidence based upon the Court's finding that that information should have been produced and was intentionally withheld by Du Pont.

5. On December 30, 1994, Dennis Keeler was ordered to appear at a deposition pursuant to two (2) other Courts' orders in other cases on the mainland regarding information pertaining to Plaintiffs' 9369A.

6. This Court found that the information in P-9369A was responsive to Plaintiffs' discovery requests yet Du Pont, even after being ordered to produce that information, did not update that information. Plaintiffs discovered this information when Mr. Keeler was deposed on December 30, 1994.

7. Considering this Court's remedial, progressive sanctions, this Court's finding that Mr. Keeler's information was responsive and ordered to be produced, Defendant Du Pont's failure to produce the information, and the Court having reviewed the December 30, 1994 deposition of Dennis Keeler regarding the reasons why this information was not produced, this Court again finds that Defendant Du Pont engaged in a pattern of discovery abuse.

8. Du Pont throughout this trial stonewalled. In other words, as this Court stated previously, Du Pont cannot build a wall around each case and ignore information produced in those other cases. The issue in this case regarding whether or not Benlate is defective is similar to those other cases.

9. Du Pont has engaged in what this Court would characterize as dump truck discovery. Forty (40) boxes of documents were "dumped" on Plaintiffs pursuant to an interrogatory request which made Plaintiffs come back to this Court asking Du Pont to specifically identify what documents were responsive to their interrogatories. Prior to that, this Court issued an Order that Du Pont cannot engage in such conduct.

10. This Court ordered that Du Pont identify documents pertaining to Plaintiffs' interrogatories. This Court even went as far as saying if it pertains to so many pages that Du Pont must identify those specific pages. However, this Court did not enforce that specific requirement, recognizing as this case progressed, the numerous documents in this litigation, nor did Plaintiffs request five pages being responsive to an interrogatory.

11. This Court has also considered the privilege log that was produced to the Master and a copy which was produced to the Court which was not the same.

12. This Court finds that this Court spent numerous hours over discovery motions. This Court is not imposing any sanction for what a party in a litigation is entitled to pursue. However, this Court is concerned about the abuse in a case of this magnitude. The issues are complex enough without misconduct in discovery.

13. The Court would note that in a Federal Court Du Pont was conditionally sanctioned $500,000.00 which the Judge increased to $1 million dollars.

14. The Court would also note that there are other Benlate cases pending in the State of Hawaii and in order to fashion a sanction that would deter Du Pont at least from acting the way it did in this State, the Court will order the following sanctions:

A. In considering the totality of the conduct of Defendant Du Pont in this case, as well as the statements of the other Judges on the record from other jurisdictions[,] as referred to in Plaintiffs' memorandum and exhibits, not considering the orders that were vacated, and considering Du Pont's wealth and financial status, this Court finds that in order to deter this type of discovery abuse, that Du Pont be sanctioned $1.5 million dollars.

B. Du Pont shall pay Plaintiffs' attorneys' fees and costs which were incurred as a result of the discovery abuse. Plaintiffs' counsel shall prepare and submit an affidavit regarding the attorneys' fees and costs incurred as a result of the discovery process;

C. That the Protective Orders issued by this Court concerning the confidentiality of Du Pont documents be lifted with the exception of those documents which contain trade secrets; and

D. As a remedial measure imposed as part of this punitive sanction, the Jury will be instructed as follows:

You are instructed that Dr. Jodie Johnson was recalled in the Plaintiffs' case to testify regarding information, which was requested

> before trial by the Plaintiffs and withheld by Defendant Du Pont.
>
> Plaintiffs discovered this information after Dr. Johnson first testified.

(Emphases added.)

F. Jury Instructions

Pursuant to its punitive sanctions order, the circuit court gave the following remedial instructions to the jury:

> You are instructed that Dr. Jod[ie] Johnson was recalled in the Plaintiffs' case to testify regarding information which was requested before trial by the Plaintiffs and withheld by Defendant Du Pont. Plaintiffs discovered this information after Dr. Johnson first testified.
>
> You are instructed that the test results contained in Plaintiffs' Exhibit P-9369A, responsive to Plaintiffs' interrogatories, were withheld from the Plaintiffs by Defendant Du Pont.
>
> This information was requested by the Plaintiffs before the trial and should have been produced by Defendant Du Pont. Plaintiffs did not discover this evidence until July, 1994 after the start of this trial.
>
> You are further instructed that the information in the Dennis Keeler deposition of December 30, 1994 relating to the contamination of Benlate packaged by Defendant Bartlo relevant to Plaintiffs' Exhibit P-9369A, including Plaintiffs' Exhibit K[-]41 responsive to Plaintiffs' interrogatories, was also withheld from Plaintiffs by Defendant Du Pont.

> This information was requested by Plaintiffs before the trial and should have been produced by Defendant Du Pont. As a result Plaintiffs did not discover this evidence until January 1995.
>
> In considering the issues of this case, you may consider Defendant Du Pont's withholding of this evidence and give it the weight, if any, you deem appropriate.

The Court also instructed the jury on the Plaintiffs' three distinct causes of action: (I) negligence and (II) strict liability in the design or manufacture of Benlate; and (III) breach of the express warranty on the Benlate label. The circuit court also specifically instructed the jury that it "may not find Defendants negligent or strictly liable for their failure, if any, to provide warnings on the Benlate label or packaging."

G. The Verdicts and Judgments

On January 26, 1995, the jury returned verdicts in favor of the Plaintiffs on all three causes of action. More specifically, the jury found that: (1) "there was a defect in the manufacture or design of the Benlate sold to [the Plaintiffs]"; (2) the Liability Defendants were "engaged in the business of manufacturing, formulating, packaging, or selling such defective Benlate"; (3) "such defective Benlate [was] a legal cause of damage to [the Plaintiffs]"; (4) the Liability "Defendants [were] negligent with respect to Benlate"; (5) "such negligence [was] a legal cause of damage to [the Plaintiffs]"; (6) DuPont "breached [at least one of the] express warranties on the label regarding Benlate sold to [the Plaintiffs]"; and (7)

DuPont's "breach of express warranty on the label [was] a legal cause of damages to [the Plaintiffs]."

With respect to the Plaintiffs' prayer for punitive damages, the jury found "by clear and convincing evidence that Defendant [DuPont] [wa]s liable for punitive damages[.]"

As a result, the jury awarded the following: $8,399,000 in compensatory damages and $12,500,000 in punitive damages to the Tomono Plaintiffs, and $1,180,000 in compensatory damages and $1,770,000 in punitive damages to Kawamata Farms. These awards were based on the injury to the Plaintiffs' crops.

The jury did not award any "soil restoration damages" and "farm structure restoration damages" to the Plaintiffs or the Declaratory Defendants. The jury found that, to the extent that any of the Plaintiffs were negligent, the Plaintiffs' negligence was not the legal cause of any damages. The jury also found that the Tomono Plaintiffs were not liable to the Declaratory Defendants for negligence, waste, or breach of contract. Accordingly, the jury awarded no damages to the Declaratory Defendants.

Because the Tomono Plaintiffs and the Liability Defendants prevailed with respect to the Declaratory Defendants' counterclaim and cross-claim, the circuit court awarded costs in favor of Tomono Plaintiffs and Liability Defendants and against the Declaratory Defendants as follows:

(1) with respect to the Tomono Plaintiffs, $7,654.16;

(2) with respect to DuPont, $11,072.59;

(3) with respect to Platte, United Agri Products, Loveland, and Hasegawa, $949.56; and

(4) with respect to Terra International, $1,182.06.

H. Post-Trial Motions

Shortly after the conclusion of the trial, DuPont and Bartlo Packaging, Inc. (Bartlo) moved for a new trial based on newly discovered evidence involving the alleged fraud, misrepresentation, or misconduct of the Plaintiffs. DuPont and Bartlo asserted that the Plaintiffs had concealed the involvement of two expert scientists, Dr. Harry K. Tayama and Dr. David S. Koranski, by having failed to identify either scientist in response to the Liability Defendants' discovery requests, and by having failed to assert any privilege. However, the circuit court denied the motion for a new trial because: (1) the circuit court had not ordered disclosure of these consultants or their work product; (2) in response to DuPont's past motion to compel discovery, the Plaintiffs had properly claimed work product privilege regarding the identities of the Plaintiffs' consultants; (3) the Plaintiffs had given DuPont an adequate opportunity to obtain Benlate samples from the Plaintiffs and to perform tests on those samples for presentation at trial; and (4) even if the circuit court had ordered the disclosure of the experts' identities and their information, any testimony on the part of Drs. Tayama and Koranski would not have been material and controlling, nor would it have changed the outcome of the trial.

The Liability Defendants also filed a post-trial motion for judgment notwithstanding the verdict, contending that, because the jury concluded that the Plaintiffs' injuries were a result of "economic loss," rather than damage to the soil or farm structures, the economic loss doctrine precluded Plaintiffs from any recovery in tort as a matter of law. The circuit court denied the motion for judgment notwithstanding the verdict, concluding, among other things, that "[t]he majority of Plaintiffs' compensatory damages awarded by the jury were for plant replacement costs for the damages to Plaintiffs' plant inventory [that] constitutes 'other property,' which therefore brings this case out of the realm of the economic loss doctrine."

The Liability Defendants filed this timely appeal. On September 12, 1995, this court consolidated DuPont's interlocutory appeal from the sanctions order lifting all previously-entered protective orders, Case No. 18736, with this appeal.

Shortly after the jury verdict, the Plaintiffs discovered that, in the *Smith v. DuPont* case in Florida, DuPont had disclosed additional information regarding Benlate contamination that DuPont had intentionally failed to produce and/or identify in response to the Plaintiffs' interrogatories in the instant case. Based on this discovery, the circuit court amended its earlier punitive sanction order by, among other things, awarding the Plaintiffs additional attorneys' fees and costs and reaffirming the previous $1.5 million fine against DuPont.

Based upon this post-verdict discovery of further discovery misconduct on the part of DuPont, the Declaratory Defendants filed a motion for a new trial on May 26,

1995. On July 19, 1995, the circuit court denied the Declaratory Defendants' motion for a new trial, stating, in pertinent part, the following:

> Defendants/Crossclaimants/Counterclaimants do not meet the three requirements for a new trial set forth in *Orso v. City and County of Honolulu*, 56 Haw. 241, 250, 534 P.2d 489, 494 (1975). Defendants/Crossclaimants/Counterclaimants did not show due diligence in pursuing the discovery at issue since most frequently it took no position regarding discovery motions.

I. Post-Appeal Motions

After the jury verdict in the instant case, significant developments took place in another of DuPont's Benlate-related cases, namely *In re E.I. du Pont de Nemours and Co.*, 918 F.Supp. 1524 (M.D.Ga.1995), *reversed, In re E.I. DuPont De Nemours & Company-Benlate Litigation*, 99 F.3d 363 (11th Cir.1996), *cert. denied, E.I. DuPont de Nemours and Company v. Bush Ranch, Inc.*, ___ U.S. ___, 118 S.Ct. 263, 139 L.Ed.2d 190 (1997), also known as the Bush Ranch litigation. In the Bush Ranch litigation, the Bush Ranch plaintiffs sued DuPont in federal court for damages resulting from defective Benlate. After the case was submitted to the jury, the Bush Ranch plaintiffs offered to settle their claims, and DuPont agreed. On August 16, 1993, the Bush Ranch plaintiffs voluntarily dismissed their claims with prejudice.

After the settlement, the Plaintiffs in the instant case requested documents related to the testing of Benlate from the Bush Ranch litigation. DuPont resisted, but DuPont eventually produced the documents pursuant to

a court order. Among the documents produced were some of the Alta documents, which DuPont had not produced in the Bush Ranch litigation. The Alta documents included analytical findings that some experts would construe as evidence that Benlate was contaminated with sulfonylureas.

As a result of the production of the Alta documents in the instant case, the Bush Ranch plaintiffs returned to the federal district court, more than a year and a half after the settlement of the Bush Ranch litigation, with a petition seeking sanctions against DuPont. The Bush Ranch plaintiffs charged that DuPont had intentionally withheld evidence of sulfonylurea contamination, which was in its possession and which the district court had ordered it to produce. Furthermore, the petition charged that DuPont had falsely represented to the district court and to the Bush Ranch plaintiffs that the Alta documents it withheld contained no evidence of sulfonylurea contamination. On August 21, 1995, the district court agreed with the Bush Ranch plaintiffs and sanctioned DuPont by, among other things, ordering DuPont to either pay $101 million to the court or publish a judicially approved confession of guilt in selected newspapers across the United States. *In re E.I. DuPont De Nemours and Co.*, 918 F.Supp. at 1557-58.

After learning about these events in the Bush Ranch litigation, on August 31 and September 12, 1995, the Plaintiffs and the Declaratory Defendants in the instant case returned to the circuit court and filed motions, pursuant to Hawai'i Rules of Civil Procedure (HRCP) Rule 60(b)(3), seeking to alter or amend the judgment based upon the newly discovered evidence of fraud, intentional

misrepresentation, and other misconduct on the part of DuPont. The Plaintiffs and Declaratory Defendants also sought sanctions against DuPont. Although DuPont had eventually produced the Alta documents in the instant case pursuant to court orders and sanctions, DuPont had asserted that the Alta documents were privileged under the work product doctrine, and DuPont had represented to Discovery Master Takao that the Bush Ranch Alta documents had never been produced, proffered, or in any way used in any other Benlate trial. However, according to the transcripts of DuPont's attorneys' testimony in the Bush Ranch litigation, DuPont had actually waived the work product privilege with respect to the Alta documents during the Bush Ranch trial in July and August 1993. The Plaintiffs in the instant case claimed that: (1) DuPont's fraudulent assertion of the work product privilege had delayed their receipt of the Alta documents, and, thus, had prejudiced the Plaintiffs at trial; and (2) if the Plaintiffs had received the Alta documents earlier, the jury might have awarded soil remediation damages as well as an increased punitive damage award. The Plaintiffs sought, among other things, an award for the Plaintiffs' attorneys' fees and costs for the entire litigation.

On April 26, 1996, while the instant case was on appeal before this court, the circuit court issued a minute order stating its intention to grant the HRCP Rule 60(b)(3) motion and directing the Plaintiffs to file the necessary motion before this court for remand. Attached to that order was a sixty-page document setting forth findings of fact, conclusions of law, and a proposed order with respect to the Plaintiffs' HRCP Rule 60(b)(3) motion. That document announced, among other things, the following

conclusions: (1) the circuit court had jurisdiction over the motion pursuant to HRCP Rule 60(b)(3) and the circuit court's inherent powers; (2) DuPont had engaged in discovery misconduct in this case by asserting the work product privilege with respect to the Alta Bush Ranch documents; and (3) that DuPont should be sanctioned. Among its many conclusions of law, the circuit court stated in conclusions of law 17, 22, 27, and 30 that specific representations by DuPont to the circuit court regarding production of the Alta Bush Ranch documents were fraudulent by clear and convincing evidence. The circuit court also specifically stated the following in conclusions of law 39 and 40:

> 39. This Court finds that Du Pont's conduct as set forth herein constitutes abusive litigation practices and specifically finds that such practices were done in bad faith. This Court may properly assess attorney's fees under its inherent authority under HRS § 603-21.9(1) and (6) (1985).
>
> 40. This Court concludes that Du Pont's conduct set forth in the Findings of Fact herein demonstrates that Du Pont engaged in fraud and intentional misconduct which abused the judicial process. Du Pont acted in bad faith, wantonly and for oppressive reasons and, therefore, this Court has inherent authority to levy sanctions, award attorneys fees and costs, and correct judgments and orders.

(Emphases added.)

The circuit court also entered the following conclusion of law with respect to DuPont's past assertion that

the Alta Bush Ranch documents were privileged under the attorney work product doctrine:

> 44. This Court finds based on all the evidence now available to the Court that the ALTA Bush Ranch documents were never entitled to work product privilege in this case. This Court also finds that even if the ALTA Bush Ranch documents could have been entitled to such a privilege claim, such a privilege claim was waived in this case by Defendant DuPont by August 25, 1993.

(Emphases added.)

As its sanction, the circuit court proposed to: (1) award the Plaintiffs and the Declaratory Defendants additional attorneys' fees and costs incurred throughout the pre-trial, trial, and post-trial proceedings, relating to the misconduct, which had not been previously awarded as sanctions; (2) reaffirm its prior punitive sanctions order and the $1.5 million sanction; and (3) amend its earlier order to accurately reflect how the circuit court would have ruled if the circuit court had known of DuPont's misconduct at the time the orders were issued. The circuit court stated, among many other things, the following:

> III. ORDER
>
> Based upon the above Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:
>
> A. The Judgments entered herein on May 16 and 17, 1995 are hereby amended to include the

additional attorneys fees, costs and monetary Punitive Sanction as detailed below;

B. This Court's May 16, 1995 Amended Order Imposing Punitive Sanctions Against Defendant E.I. Du Pont De Nemours and Company, Inc. is hereby amended as follows:

1. Du Pont is ordered to pay Plaintiffs' and Declaratory Relief Defendants' attorneys fees and costs incurred throughout the pre-trial, trial and post-trial proceedings relating to the misconduct found herein which have not previously been awarded as sanctions, including all attorneys fees and costs for this motion and all proceedings attendant hereto. Plaintiffs shall submit affidavits of fees and costs and the Court shall thereafter issue a ruling regarding the amount to be awarded hereunder;

2. This Court's previously issued $1.5 million dollar Punitive Sanction is hereby reaffirmed;

C. This Court hereby reaffirms the remaining findings in the Court's May 16, 1995 Amended Order Imposing Punitive Sanctions Against Defendant E.I. Du Pont De Nemours and Company, Inc. not amended herein regarding Du Pont's pattern of discovery abuse and intentional conduct;

D. This Court hereby orders that the Orders listed in Section H of the Findings of Fact and Section L of the Conclusions of Law above shall be corrected as noted to accurately reflect what this Court would have ruled on those matters had this Court known of Du Pont's misconduct found herein at the time said Orders were issued.

In response to the Plaintiffs' motion for remand, this court issued an order on August 19, 1996, remanding this case to the circuit court for the purpose of allowing the circuit court to enter its findings of fact, conclusions of law, and order regarding the Plaintiffs' and Declaratory Defendants' motions for HRCP Rule 60(b)(3) relief and for sanctions against DuPont. This court's remand order also informed the parties that they could submit ten-page briefs limited to the propriety of the relief granted pursuant to the HRCP Rule 60(b)(3) motion. On August 22, 1996, the circuit court filed its findings of fact, conclusions of law, and an order regarding the Plaintiffs' and Declaratory Defendants' motions for Rule 60(b)(3) relief and for sanctions against DuPont.

II. DISCUSSION

A. The Circuit Court Did Not Allow the Jury to Impose Liability Based on FIFRA-Preempted Claims as a Result of Its Two Summary Judgment Rulings

The Liability Defendants contend that the circuit court erroneously allowed the jury to consider liability based on claims that the FIFRA preempted by entering the following two orders: (1) on April 15, 1994, the circuit court issued an order partially granting the Liability Defendants' motion for partial summary judgment regarding FIFRA preemption issues; and (2) on June 9, 1994, the circuit court issued an order denying the Liability Defendants' motion for partial summary judgment as to breach of warranty claims. We disagree.

We review a circuit court's summary judgment order de novo under the same standard applied by the circuit court. *Maguire v. Hilton Hotels Corp.*, 79 Hawai'i 110, 112, 899 P.2d 393, 395 (1995).

> [S]ummary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties.

Id. (citations, emphasis, internal quotation marks, and original brackets omitted); *see* HRCP Rule 56(c).

The FIFRA, 7 U.S.C.A. §§ 136-136y (1992), is a comprehensive federal statute that regulates, among other things, fungicide use, sales, and labeling, and grants enforcement authority to the EPA. Under the FIFRA, no fungicide may be sold in the United States unless it is registered with the EPA. A manufacturer wishing to market its product must first petition the EPA for registration. 7 U.S.C.A. § 136a. The applicants for registration are responsible for submitting certain performance data to the EPA. 40 C.F.R. §§ 158.100-158.740 (1996). Labeling requirements are set forth in great detail. 40 C.F.R. § 156.10 (1996). The pesticide manufacturer must include a copy of a proposed label as part of the registration petition. 7 U.S.C.A. § 136a(c)(1)(C). If the label is not adequate or accurate, the pesticide is "misbranded," and

the manufacturer is subject to various penalties, including revocation of registration. 7 U.S.C.A. §§ 136(q), 136j(a)(1)(F), 136k, 136l, 136m, and 136q. The FIFRA also authorizes the EPA to establish standards for the packaging of pesticides "in order to protect children and adults from serious injury or illness resulting from accidental ingestion or contact with pesticides or devices regulated by [the FIFRA] as well as to accomplish the other purposes of [the FIFRA]." 7 U.S.C.A. § 136w(c)(3).

The Liability Defendants contend that the FIFRA, as the law of the United States, preempted the Plaintiffs' state law claims. The Supremacy Clause provides that the laws of the United States "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2.

> Preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, when there is outright or actual conflict between federal and state law. Whether a state law establishing a cause of action is preempted in a given case is a question of congressional intent.

Norris v. Hawaiian Airlines, Inc., 74 Haw. 235, 245-46, 842 P.2d 634, 639 (1992) (citations and internal quotation marks omitted), *aff'd*, 512 U.S. 246, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994).

> When Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to

> state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation. Such reasoning is a variant of the familiar principle of expressio unius est exclusio alterius: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.

Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517, 112 S.Ct. 2608, 2618, 120 L.Ed.2d 407 (1992) (citations and internal quotation marks omitted). Therefore, where Congress has included an express preemption clause in the statute, the analysis of preemption starts with the language of that provision. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, ___, 116 S.Ct. 2240, 2250, 135 L.Ed.2d 700 (1996).

> Although our analysis of the scope of the pre-emption statute must begin with its text, our interpretation of that language does not occur in a contextual vacuum. Rather, that interpretation is informed by two presumptions about the nature of pre-emption.
>
> First, because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. . . .

> Second, our analysis of the scope of the statute's pre-emption is guided by our oft-repeated comment . . . that the purpose of Congress is the ultimate touchstone in every pre-emption case. As a result, any understanding of the scope of a pre-emption statute must rest primarily on a fair understanding of congressional purpose. Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the statutory framework surrounding it. Also relevant, however, is the structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.

Id. at ___-___, 116 S.Ct. at 2250-51 (citations, internal quotation marks, original ellipsis points, and original brackets omitted).

The FIFRA contains an express preemption clause, which states the following:

> § 136v. Authority of States
>
> (a) In general
>
> A state may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> (b) Uniformity
>
> Such State shall not impose or continue in effect any requirements for labeling or packaging in

> addition to or different from those required under this subchapter.

7 U.S.C.A. § 136v. It is apparent from § 136v(a), as well as other statutory language, *e.g.*, 7 U.S.C.A. § 136w-1, that the FIFRA does not wholly oust the states from pesticide regulation. However, it is equally apparent from § 136v(b) that the states cannot apply different or additional "requirements" for "labeling and packaging." In this context, the word "requirements" in § 136v(b) presumptively includes state common law tort causes of action as well as state laws and regulations. *See Medtronic*, 518 U.S. at ___-___, 116 S.Ct. at 2251-53 (plurality opinion); *id.* at ___-___, 116 S.Ct. at 2259-60 (Breyer, J., concurring in part and concurring in judgment); *id.* at ___-___, 116 S.Ct. at 2262-63 (O'Connor, J., Rehnquist, C.J., and Scalia and Thomas, JJ., concurring in part and dissenting in part); *Cipollone*, 505 U.S. at 521-22, 112 S.Ct. at 2620-21 (plurality opinion); *id.* at 548-49, 112 S.Ct. at 2633-34 (Scalia and Thomas, JJ., concurring in judgment in part and dissenting in part).

Consequently, under § 136v(b), the FIFRA preempts any common law tort claim to the extent that the "claim depends upon inadequacies in labelling or packaging[.]" *Taylor AG Industries v. Pure-Gro*, 54 F.3d 555, 563 (9th Cir.1995) (citation and internal quotation marks omitted). In accordance with prevailing case law, the circuit court in the instant case granted the Liability Defendants' motion for partial summary judgment regarding FIFRA preemption issues to the extent that the Plaintiffs' negligence, strict liability, and accompanying failure to warn

claims in Counts I and II were based upon inadequacies in the labeling and packaging of Benlate.[2]

However, because the circuit court's order only partially granted summary judgment, the circuit court impliedly denied summary judgment with respect to the Plaintiffs' negligence and strict liability claims in Counts I and II for a defect in the manufacture or design of Benlate

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[2] *See, e.g., Grenier v. Vermont Log Bldgs., Inc.*, 96 F.3d 559, 563-65 (1st Cir.1996); *King v. E.I. DuPont de Nemours and Co.*, 996 F.2d 1346, 1349 (1st Cir.), *cert. dismissed*, 510 U.S. 985, 114 S.Ct. 490, 126 L.Ed.2d 440 (1993); *Lowe v. Sporicidin Int'l*, 47 F.3d 124, 129 (4th Cir.1995); *Worm v. American Cyanamid Co.*, 5 F.3d 744, 748 (4th Cir.1993); *MacDonald v. Monsanto Co.*, 27 F.3d 1021, 1024-25 (5th Cir.1994); *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 369-71 (7th Cir.1993); *Bice v. Leslie's Poolmart, Inc.*, 39 F.3d 887, 888 (8th Cir.1994); *Taylor AG Industries v. Pure-Gro*, 54 F.3d 555, 560 (9th Cir.1995); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177, 1179 (10th Cir.), *cert. denied*, 510 U.S. 813, 114 S.Ct. 60, 126 L.Ed.2d 30 (1993); *Papas v. Upjohn Co.*, 985 F.2d 516, 518 (11th Cir.), *cert. denied*, 510 U.S. 913, 114 S.Ct. 300, 126 L.Ed.2d 248 (1993); *Barnes v. Sandoz Crop Protection Corp.*, 189 Ariz. 46, 938 P.2d 95, 97 (App.1997); *Hottinger v. Trugreen Corp.*, 665 N.E.2d 593, 598 (Ind.Ct.App.1996); *Schuver v. E.I. DuPont de Nemours & Co. (Inc.)*, 546 N.W.2d 610, 614-15 (Iowa), *cert. denied*, ___ U.S. ___, 117 S.Ct. 274, 136 L.Ed.2d 197 (1996); *Jenkins v. Amchem Products, Inc.*, 256 Kan. 602, 886 P.2d 869, 884 (1994), *cert. denied*, 516 U.S. 820, 116 S.Ct. 80, 133 L.Ed.2d 38 (1995); *Hochberg v. Zoecon Corp.*, 421 Mass. 456, 657 N.E.2d 1263, 1266-67 (1995); *Ackles v. Luttrell*, 252 Neb. 273, 561 N.W.2d 573, 579, *cert. denied*, ___ U.S. ___, 118 S.Ct. 329, 139 L.Ed.2d 255 (1997); *Lewis v. American Cyanamid Co.*, 294 N.J.Super. 53, 682 A.2d 724, 728-32 (App.Div.1996), *cert. granted*, 151 N.J. 74, 697 A.2d 546 (1997); *Quest Chemical Corp. v. Elam*, 898 S.W.2d 819, 820-21 (Tex.1995); *Hue v. Farmboy Spray Co., Inc.*, 127 Wash.2d 67, 896 P.2d 682, 692 (1995); *All-Pure Chemical Co. v. White*, 127 Wash.2d 1, 896 P.2d 697, 701-02 (1995).

to the extent that these counts were not based on inadequacies in the labeling and packaging of Benlate. Furthermore, the order expressly denied summary judgment with respect to the Plaintiffs' claim in Count III alleging breach of express warranty.

As a result, based on Counts I and II, the jury eventually found that the Liability Defendants were liable under negligence and strict liability theories for a defect in the manufacture or design of Benlate.[3] Based on Count III, the jury also found that the Liability Defendants were liable for breach of express warranty.[4]

As stated, the Liability Defendants contend that the circuit court's refusal to grant all aspects of their motion for partial summary judgment regarding FIFRA preemption issues allowed the jury to impose liability based on claims that the FIFRA preempted. The Liability Defendants claim that, despite granting summary judgment with respect to the Plaintiffs' failure to warn claims, the circuit court instructed the jury that it could find the

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[3] According to the two special verdict forms that the jury returned on January 26, 1995, the jury found the Liability Defendants liable under negligence and strict liability theories because: (a) "there was a defect in the manufacture or design of the Benlate" sold to the Plaintiffs; (b) the Liability "Defendants [were] negligent with respect to Benlate"; and (c) both the defective Benlate and the Liability Defendants' negligence were "legal cause[s] of damage to" the Plaintiffs.

[4] According to the two special verdict forms that the jury returned on January 26, 1995, the jury found that the Liability Defendants' "breach of express warranty on the label [was a] legal cause of damages to" the Plaintiffs.

Liability Defendants liable for failing to warn the Plaintiffs about the defect in Benlate by any means other than the Benlate label. Case law is divided as to whether the FIFRA does[5] or does not[6] preempt failure to warn claims

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[5] *See, e.g., Worm v. American Cyanamid Co.*, 5 F.3d 744, 748 (4th Cir.1993) ("To allow the [plaintiffs] to argue that the warning language which appears on point-of-sale or other promotional material is inadequate when that language is identical to that approved by the EPA would in effect allow the establishment of an additional or different state law requirement concerning adequate warning language." (Citation omitted).); *Taylor AG Industries v. Pure-Gro*, 54 F.3d 555, 561 (9th Cir.1995) ("[W]e hold that Appellants' claim for inadequate point-of-sale warnings is preempted because their claim is premised ultimately upon the inadequacy of the product label."); *Papas v. Upjohn Co.*, 985 F.2d 516, 519 (11th Cir.) ("[A]ny claims that point-of-sale signs, consumer notices, or other informational materials failed adequately to warn the plaintiff necessarily challenge the adequacy of the warnings provided on the product's labeling or packaging."), *cert. denied*, 510 U.S. 913, 114 S.Ct. 300, 126 L.Ed.2d 248 (1993); *Goodwin v. Bacon*, 127 Wash.2d 50, 896 P.2d 673, 681 (1995) ("We agree with the majority of courts refusing to distinguish non-label failure to warn claims[.]" (Citation omitted.)).

[6] *See, e.g., Miller v. E.I. DuPont de Nemours and Co.*, 880 F.Supp. 474, 479 (S.D.Miss.1994) ("[W]hile plaintiffs do suggest that Du Pont should have taken steps to warn of the fact of and dangers associated with the atrazine contamination of its Benlate DF, nothing about this claim implies that Du Pont should have included additional, different, or alternatively stated warnings on the Benlate product label."); *Burke v. Dow Chemical Co.*, 797 F.Supp. 1128, 1140 (E.D.N.Y.1992) ("If . . . warnings to the trade, warnings apart from labels or packaging, limitation on sales to professionals, or other protections falling generally within the ambit of warnings should have been used when the content of the label was fixed by [the] EPA[,] there remains a liability question for the trier of

that are not directly based on the language of the label. However, we need not resolve this particular preemption issue because the Liability Defendants waived any errors in the circuit court's jury instructions regarding any theory of liability based upon a failure to warn by having failed to comply with the applicable Hawai'i Rules of Appellate Procedure (HRAP).

Under HRAP Rule 28(b)(4)(B), we require appellants to provide, among other things, the following:

> (4) A concise statement of the points on which appellant intends to rely, set forth in separate, numbered paragraphs. Each point shall refer to the alleged error committed by the court or agency upon which appellant intends to rely. The point shall show where in the record the alleged error occurred and where it was objected to and, where applicable, the following:
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> . . . .
>
> (B) When the point involves the charge of the court, there shall be set out the specific words of

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fact." (Citation omitted.)); *In re DuPont-Benlate Litigation*, 859 F.Supp. 619, 623 (D.P.R.1994) ("[W]hile claims of a failure to warn or communicate information about a regulated product are preempted by FIFRA, claims of a failure to warn about a defect of certain individual items are not foreclosed[.]"); *Macrie v. SDS Biotech Corp.*, 267 N.J.Super. 34, 630 A.2d 805, 813 (App.Div.) ("State law may require a pesticide manufacturer like defendant to take reasonable steps, either through instructions to its customers or directly through its own efforts, to assure that persons, like plaintiffs, who handle produce bought directly from farmers who have used [a fungicide], will be warned of its dangers, at least by receiving defendant's brochures in the form prescribed by the E.P.A."), *cert. denied*, 134 N.J. 565, 636 A.2d 522 (1993).

> the part referred to, whether it be instructions given or refused, together with the objections urged at the trial.

"Points not presented in accordance with this section will be disregarded, except that the court, at its option, may notice a plain error not presented." HRAP Rule 28(b)(4)(D).

In the section of their joint opening brief entitled "Statement of Points on Appeal," the Liability Defendants failed to specifically assert any error regarding a jury instruction regarding a failure to warn theory of liability. The Liability Defendants failed to show where in the record any such jury instruction occurred, where it was objected to, and they also failed to set out the specific words of the part referred to, together with the objections urged at the trial. "[F]ailure to comply with HRAP [Rule] 28(b)(4) is alone sufficient to affirm the judgment of the circuit court." *O'Connor v. Diocese of Honolulu*, 77 Hawai'i 383, 385, 885 P.2d 361, 363 (1994); *Bettencourt v. Bettencourt*, 80 Hawai'i 225, 228, 909 P.2d 553, 556 (1995); *City & County of Honolulu v. Kailua Auto Wreckers, Inc.*, 66 Haw. 532, 533, 668 P.2d 34, 35 (1983).

Normally "the policies of this court are to permit litigants to appeal and to have their cases heard on the merits, where possible." *O'Connor*, 77 Hawai'i at 386, 885 P.2d at 364. However, the circuit court in the instant case specifically instructed the jury that they could "not find [the Liability] Defendants negligent or strictly liable for their failure, if any, to provide warnings on the Benlate label or packaging." We presume that the jury followed this jury instruction. *State v. Knight*, 80 Hawai'i 318, 327, 909 P.2d 1133, 1142 (1996); *Sato v. Tawata*, 79 Hawai'i 14,

21, 897 P.2d 941, 948 (1995). Moreover, our review of the jury's special verdict forms indicates that the jury did not base its liability findings on a failure to warn theory. In light of these facts, we hold that the Liability Defendants' waived any errors in the circuit court's jury instructions regarding the theories of liability in Counts I, II and III by having failed to comply with HRAP Rule 28(b)(4)(B).

We next review whether the circuit court erred by impliedly denying the Liability Defendants' motion for partial summary judgment with respect to the allegations in Counts I and II that were not based on a failure to warn, *i.e.*, the Plaintiffs' allegations of negligence and strict liability for the defective manufacture or design of Benlate. As the United States Court of Appeals for the Fourth Circuit noted, "[w]hatever might be said with regard to some common law actions, we fail to see how a state-imposed standard of care relating to product design, manufacture, testing, and the like, can qualify as a labeling requirement under [the] FIFRA." *Worm v. American Cyanamid Co.*, 970 F.2d 1301, 1307 (4th Cir.1992). Thus, "[c]laims for negligent testing, manufacturing, and formulating [of a product] are not preempted [by the FIFRA]." *Worm v. American Cyanamid Co.*, 5 F.3d 744, 747 (4th Cir.1993); *see also Taylor AG Industries*, 54 F.3d at 561 ("Claims for negligent testing that are based solely upon the Manufacturers' testing or research practices, not related to advertising or promotion . . . are not preempted by FIFRA." (Citation omitted.)). In addition to negligence claims, when a "claim for strict liability is based on theories of defective design and manufacture and not on a theory of inadequate labeling, it is not preempted by

[the] FIFRA." *Reutzel v. Spartan Chem. Co.*, 903 F.Supp. 1272, 1281-82 (N.D.Iowa 1995).

Thus, in a product liability case very similar to the instant case, arising out of allegations that a defect in Benlate caused property damage, the United States District Court for the District of Puerto Rico concluded that "state claims of negligence in testing, manufacturing or formulating pesticides are not preempted [by the FIFRA]." *In re DuPont-Benlate Litigation*, 859 F.Supp. 619, 622 (D.P.R.1994). Furthermore, the FIFRA did not preempt the plaintiffs' strict liability claims alleging "that Benlate was defective or inadequately designed[.]" *Id.* at 623.

Other jurisdictions have similarly held that the FIFRA does not preempt negligence or strict products liability claims as long as they are not based on inadequacies in the product's labeling or packaging. *See, e.g., Arkansas-Platte & Gulf Partnership v. Dow Chem. Co.*, 886 F.Supp. 762, 766 (D.Colo.1995); *Kennan v. Dow Chem. Co.*, 717 F.Supp. 799, 811-12 (M.D.Fla.1989); *Jillson v. Vermont Log Buildings, Inc.*, 857 F.Supp. 985, 992 (D.Mass.1994); *Burt v. Fumigation Service and Supply, Inc.*, 926 F.Supp. 624, 631 (W.D.Mich.1996); *Bingham v. Terminix Int'l Co., L.P.*, 850 F.Supp. 516, 521-22 (S.D.Miss.1994); *Fisher v. Chevron Chem. Co.*, 716 F.Supp. 1283, 1287-89 (W.D.Mo.1989); *Higgins v. Monsanto Co.*, 862 F.Supp. 751, 757-60 (N.D.N.Y.1994); *Wright v. Dow Chem. U.S.A.*, 845 F.Supp. 503, 511 (M.D.Tenn.1993); *ISK Biotech Corp. v. Douberly*, 640 So.2d 85, 89 (Fla.Dist.Ct.App.1994), *review denied*, 651 So.2d 1194 (Fla.1995); *Hopkins v. American Cyanamid Co.*, 666 So.2d 615, 623 (La.1996); *Babalola v. Crystal Chems., Inc.*, 225 A.D.2d 370, 644 N.Y.S.2d 1, 2 (1996); *Hue v.*

Farmboy Spray Co., Inc., 127 Wash.2d 67, 896 P.2d 682, 693 (1995) (en banc).

Likewise, we hold that the FIFRA did not preempt the Plaintiffs' claims in Counts I and II alleging negligence and strict liability for the Liability Defendants' defective manufacture or design of Benlate. Therefore, the circuit court did not err by impliedly denying the Liability Defendants' motion for partial summary judgment with respect to these allegations in Counts I and II.

The Liability Defendants next contend that the circuit court erred in its summary judgment order by expressly denying summary judgment regarding FIFRA issues with respect to the Plaintiffs' claim in Count III alleging breach of express warranty, because the FIFRA preempted such a claim. As a general rule, a "state law claim for breach of an express warranty is preempted by FIFRA" when the "express warranty claim ar[i]se[s] solely on the basis of a labeling statement specifically required by federal law and approved by the EPA." *Welchert v. American Cyanamid, Inc.*, 59 F.3d 69, 73 (8th Cir.1995) (emphases added); *Worm*, 5 F.3d at 749. However, preemption "does not extend to all express warranty claims made under [the] FIFRA." *Taylor AG Industries*, 54 F.3d at 563. Some federal appellate courts have suggested that the FIFRA might preempt breach of express warranty claims only with respect to label statements that the FIFRA requires, and, thus, are EPA mandated, as opposed to label statements that manufacturers have voluntarily put on their labels, and, thus, are merely EPA approved. *See, e.g., Welchert*, 59 F.3d at 73; *Papas v. Upjohn Co.*, 985 F.2d 516, 519 (11th Cir.), *cert. denied, Papas v. Zoecon Corp.*, 510 U.S. 913, 114 S.Ct. 300, 126 L.Ed.2d 248 (1993).

Such courts, in turn, have generally referred to *Cipollone*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407, in which the United States Supreme Court analyzed the issue of federal preemption with respect to the Federal Cigarette Labeling and Advertising Act (FCLAA) and the Public Health Cigarette Smoking Act of 1969 (PHCSA), 15 U.S.C. §§ 1331-1340. Through the FCLAA and the PHCSA, the federal government has regulated cigarette advertising on a nationwide basis. The preemption clause in the FCLAA, which Congress enacted in 1965, was somewhat narrow, stating in pertinent part that "[n]o statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." *Id.* at 514, 112 S.Ct. at 2616 (citation and internal quotation marks omitted). The preemption clause in the PHCSA, which Congress enacted in 1969, was much broader, stating that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." *Id.* at 515, 112 S.Ct. at 2616 (citation and internal quotation marks omitted). The issue arose whether the preemption clauses in the FCLAA and the PHCSA barred a plaintiff's action against three cigarette companies for the death of the plaintiff's mother, who had suffered lung cancer as a result of smoking cigarettes, because, among his causes of action, the plaintiff based his claim for breach of express warranty on many statements that the cigarette manufacturers made in their advertisements. After concluding that the FCLAA only preempted state and federal rule-

making bodies from mandating particular cautionary statements and did not preempt state-law damages actions, *id.* at 519-20, 112 S.Ct. at 2619, Justice Stevens, in a plurality opinion joined by three other members of the court, explained why the plaintiff's breach of express warranty claim also survived preemption under the PHCSA:

> A manufacturer's liability for breach of an express warranty derives from, and is measured by, the terms of that warranty. Accordingly, the requirements imposed by an express warranty claim are not imposed under State law, but rather imposed by the warrantor. If, for example, a manufacturer expressly promised to pay a smoker's medical bills if she contracted emphysema, the duty to honor that promise could not fairly be said to be imposed under state law, but rather is best understood as undertaken by the manufacturer itself. While the general duty not to breach warranties arises under state law, the particular requirement based on smoking and health with respect to the advertising or promotion of cigarettes in an express warranty claim arises from the manufacturer's statements in its advertisements. In short, a common-law remedy for a contractual commitment voluntarily undertaken should not be regarded as a requirement imposed under State law within the meaning of § 5(b) [of the PHCSA].
>
> That the terms of the warranty may have been set forth in advertisements rather than in separate documents is irrelevant to the pre-emption issue (though possibly not to the state-law issue of whether the alleged warranty is valid and enforceable) because, although the breach of

> warranty claim is made with respect to advertising, it does not rest on a duty imposed under state law. Accordingly, to the extent that petitioner has a viable claim for breach of express warranties made by respondents, that claim is not pre-empted by the [PHCSA].

Id. at 525-27, 112 S.Ct. at 2622-24 (emphases added) (footnotes, internal quotation marks, brackets, ellipses points, and original brackets omitted).

As a direct result of *Cipollone*, the United States Court of Appeals for the Eleventh Circuit suggested, but did not hold, that the FIFRA might not preempt a claim that a manufacturer breached an express warranty if the FIFRA did not require the language comprising the express warranty, because a warrantor undertakes such a warranty voluntarily:

> Express warranties are promises that are made in some, but not all, sales contracts. Express warrantors seek competitive advantage by promising buyers that certain factual representations about their goods are true. Liability for breach of an express warranty has a voluntary quality; it derives from, and is measured by, the terms of that warranty.

Papas, 985 F.2d at 519 (citation and internal quotation marks omitted). However, the issue before the *Papas* court was whether the FIFRA preempted a breach of implied warranty claim, rather than a breach of express warranty claim. The *Papas* court went on to hold that, "[a]lthough liability for breach of an express warranty may be viewed as imposed by the warrantor, . . . liability for breach of an implied warranty is based on the agreement, imposed by law, to be responsible in the event the thing sold is not in

fact fit for the use and purposes intended[,]" and, thus, "to the extent the implied warranty claim depends upon inadequacies in labelling or packaging, FIFRA section 136v pre-empts the claim." *Id.* at 519-20 (citations and internal quotation marks omitted).

The United States Court of Appeals for the Eighth Circuit also suggested, but did not hold, that the FIFRA would not preempt a plaintiff's breach of express warranty claim as long as the language comprising the express warranty was voluntarily assumed, *i.e.*, the language in the express warranty was not both required by the FIFRA and approved by the EPA. *Welchert*, 59 F.3d at 73 (acknowledging that the scope of FIFRA preemption of breach of express warranty claims is limited to language on labels that the EPA both requires and approves). However, in Welchert, "because the [plaintiffs'] state law express warranty claim challenge[d] only language specifically required and approved by the EPA, the exception for voluntarily undertaken commitments provided by the Cipollone plurality [could not] be applied . . . to save the [plaintiffs'] express warranty claim from preemption." *Id.* (footnote and internal quotation marks omitted).

Although no federal appellate court has expressly held that the FIFRA does not preempt a claim for the breach of a voluntarily assumed warranty, at least seven federal district courts and one state appellate court have taken the position that "express warranties that are voluntarily assumed survive preemption despite their relationship to labeling." *Higgins*, 862 F.Supp. at 760; *Roberson v. E.I. DuPont De Nemours & Co.*, 863 F.Supp. 929, 933-34 (W.D.Ark.1994); *Prather v. Ciba-Geigy Corp.*, 852 F.Supp.

530, 532 (W.D.La.1994) ("[W]here a pesticide manufacturer or retailer has voluntarily warranted a product's fitness for a particular purpose, courts have permitted plaintiffs to assert state law claims for breach of this warranty."); *Jillson*, 857 F.Supp. at 990; *Kenepp v. American Edwards Laboratories*, 859 F.Supp. 809, 817 (E.D.Pa.1994); *Sowers v. Johnson & Johnson Medical, Inc.*, 867 F.Supp. 306, 313-14 (E.D.Pa.1994); *In re DuPont-Benlate Litigation*, 859 F.Supp. at 623; *Babalola*, 644 N.Y.S.2d at 3; *see also Brennan v. Dow Chemical Co.*, 613 So.2d 131, 132 (Fla.Dist.Ct. App.1993) (The "FIFRA does not preempt the breach of warranty claim, since it was a common law claim arising out of a voluntary contractual commitment.").

For example, in an action against manufacturers of pesticides and insecticides, the *Higgins* court held that the FIFRA did not preempt the plaintiff's claim for breach of the manufacturers' voluntarily assumed express warranty, despite its relationship to labeling:

> Express warranties are not grounded in state law, but rather, are voluntarily assumed obligations commonly employed to gain competitive advantage in the marketplace. As such, their very nature contradicts the wording of 7 U.S.C. § 136v(b), which dictates that a "state shall not impose or continue in effect" requirements on labeling. 7 U.S.C. § 136v(b) (emphasis supplied). Therefore, based on strict statutory interpretation, express warranties that are voluntarily assumed survive preemption despite their relationship to labeling.
>
> It has been argued that express warranties are preempted because they are enforced through

> state contract law. We find this argument unpersuasive on three counts. First, the Cipollone majority clearly dictates that when Congress enacts a preemption clause, matters beyond its scope are not preempted; preemption clauses are to be narrowly construed. Since § 136v(b) [of the FIFRA] specifically prohibits state regulations from controlling labeling, but does not address self-imposed obligations enforced by [s]tates, courts are to interpret the latter as surviving preemption. Second, if states are not permitted to enforce express warranties that relate to labeling, warrantors will have less freedom in which to compete in the marketplace. Third, if an individual's only legal recourse is to bring a claim under [the] FIFRA, express warranties covering subjects outside the scope of the [FIFRA] will be futile. This court therefore holds that the Plaintiff's express warranty claims, to the extent that they are based on voluntarily assumed express warranties, are actionable.

Higgins, 862 F.Supp. at 760 (citations and footnotes omitted). The *Higgins* court especially noted the stark distinction between warranties that the EPA mandates and warranties that the EPA merely approves.

> First, express warranties have a voluntary quality, which is missing if they are mandated by [the] EPA. The rationale that warrantors should be held to contracts that they voluntarily enter into does not apply when their actions are forced. Second, express warranties are not enforceable through state contract law if Congress has expressly preempted the law or has completely occupied the law's field of operation, as is the case with EPA mandated labeling.

> Based on the foregoing justifications, we hold that EPA mandated warranties are preempted.

Id. at 761 (citations omitted). Although the defendant in Higgins did not argue that the express warranties at issue were EPA mandated, the defendant did argue that the FIFRA preempted the plaintiff's claim for breach of express warranties because "they were EPA approved." *Id.* However, the Higgins court held that mere EPA approval of an express warranty on the label of a pesticide or insecticide product did not necessitate preemption under the FIFRA for three reasons:

> First, a warranty does not lose its voluntary quality through EPA approval. Second, the mere fact that Congress gives [the] EPA the power to approve labels does not indicate that the legislative body necessarily intended that [the] EPA control over express warranties designated on the labels. Third, . . . cases [such as Cipollone] suggest that when warranties are EPA approved but not EPA mandated, Congress has not attempted to occupy an entire field and has not expressly preempted the claims. Therefore, since [the] Plaintiff's express warranty claims are not required by [the] EPA, they do not warrant an exception to the general preemption analysis. This court finds that [the] Plaintiff's express warranty claims survive preemption.

Id. (citations and footnote omitted).

Likewise, in the instant case, the Plaintiffs' breach of express warranty claim survived preemption. The Liability Defendants' warranty on the Benlate label stated the following:

NOTICE OF WARRANTY

> Du Pont warrants that this product conforms to the chemical description on the label thereof and is reasonably fit for purposes stated on such label only when used in accordance with the directions under normal use conditions. It is impossible to eliminate all risks inherently associated with the use of this product. Crop injury, ineffectiveness or other unintended consequences may result because of such factors as weather conditions, presence of other materials, or the manner of use or application, all of which are beyond the control of Du Pont. In no case shall Du Pont be liable for consequential, special or indirect damages resulting from the use or handling of this product. All such risks shall be assumed by the Buyer. DU PONT MAKES NO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE NOR ANY OTHER EXPRESS OR IMPLIED WARRANTY EXCEPT AS STATED ABOVE.

(Emphases added). The Liability Defendants have not asserted in this appeal that the above language did not constitute an enforceable "express warranty" under HRS § 490:2-313 (1993), and, thus, the Liability Defendants have waived this potential issue. However, even assuming that it was an enforceable express warranty under state law, the State of Hawai'i did not impose this express warranty upon the Liability Defendants; the Liability Defendants voluntarily imposed it upon themselves. As Justice Stevens noted in Cipollone:

> That a contract has no legal force apart from the state law that acknowledges its binding character . . . does not mean that every contractual

> provision is imposed under State law. To the contrary, common understanding dictates that a contractual requirement, although only enforceable under state law, is not imposed by the State, but rather is imposed by the contracting party upon itself.

Cipollone, 505 U.S. at 526 n. 24, 112 S.Ct. at 2622 n. 24 (citation, internal quotation marks, and brackets omitted).

Furthermore, the Liability Defendants did not even attempt to cite any section of the FIFRA or any federal regulations that might possibly have required the Liability Defendants to post an express warranty on their Benlate label. In fact, the Liability Defendants conceded in their joint opening brief that "DuPont was under no obligation to provide that [express] warranty in the first place, and was thus free to limit its scope." Liability Defendants' Joint Opening Brief at 25 n. 6. Because the Liability Defendants affirmatively waived this potential issue, there is no dispute that they voluntarily assumed the express warranty on the Benlate label, and, thus, although it was EPA approved, it was not EPA mandated under the FIFRA. Accordingly, we hold that the FIFRA did not preempt the Plaintiffs' claim for breach of express warranty, and we affirm the circuit court's order denying the Liability Defendants' motion for partial summary judgment with respect to the Plaintiffs' claim in Count III for breach of express warranty.

The Liability Defendants' final argument relating to FIFRA preemption arises out of the fact that, after the circuit court partially granted their motion for partial summary judgment regarding FIFRA preemption issues, the circuit court issued an unlawful order denying the

Liability Defendants' subsequent motion for partial summary judgment as to breach of warranty claims, which stated in pertinent part:

> IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:
>
> 1. The Court finds as a matter of law that the Benlate products['] warranty disclaimers and limitation of remedies provisions are unconscionable under the facts of this case.

The Liability Defendants assert that, by concluding that the limitation of liability clause in the express warranty was unconscionable, the circuit court did not limit itself to merely enforcing that warranty as written; it altered the Benlate label to enlarge and enhance DuPont's contractual obligations and thereby violated the FIFRA. We disagree.

We initially note that the Liability Defendants do not assert error in the circuit court's conclusion that the language of the limitation of liability clause was unconscionable. Rather, they assert that this conclusion altered the Benlate label and enlarged DuPont's contractual obligations, and, thus, that the FIFRA preempted the circuit court from mandating such a result.

We further note that the Liability Defendants have waived any errors in jury instructions that might have resulted from this particular summary judgment order, because the Liability Defendants have failed to comply with HRAP Rule 28(b)(4)(B).

The circuit court clearly differentiated between the express warranty, the limitation of liability clause, and the warranty disclaimer when it crafted its order denying

the Liability Defendants' motion for partial summary judgment based on breach of warranty claims. Under its notice of warranty, the label stated:

> Du Pont warrants that this product conforms to the chemical description on the label thereof and is reasonably fit for purposes stated on such label only when used in accordance with the directions under normal use conditions.

This, clearly, was an express warranty. With respect to the Liability Defendants' argument that the summary judgment order violated the FIFRA by altering the Benlate label and enlarging DuPont's contractual obligation, we reiterate that, by their own admission, the Liability Defendants voluntarily assumed the express warranty on the Benlate label. Because the EPA did not require an express warranty pursuant to the FIFRA, the FIFRA did not preempt the circuit court from interpreting the terms of the express warranty.

The label also stated:

> In no case shall Du Pont be liable for consequential, special, or indirect damages resulting from the use or handling of this product. All such risks shall be assumed by the Buyer.

This section was clearly intended to limit Du Pont's liability with respect to damages sustained by consumers as a result of their use of the product.

The label further stated:

> Du Pont makes no warranties of merchantability or fitness for a particular purpose nor any other express or implied warranty except as stated above.

As noted by the trial judge, this was a warranty disclaimer. Neither the warranty disclaimer nor the limitation of liability clause were required by the FIFRA and, therefore, escape preemption by FIFRA. The circuit court's conclusion that the limitation of liability clause was unconscionable did not infringe upon the FIFRA by forcing the Liability Defendants to remove or alter the Benlate label; it simply deemed the limitation of liability clause and the warranty disclaimer unenforceable. The Liability Defendants were free to leave it on their label.

The circuit court's ruling neither enlarged nor enhanced the contractual obligations of the Liability Defendants under the express warranty because the order of the circuit court did not speak to the express warranty; it referred only to the limitation of liability clause and the warranty disclaimer. By holding that the limitation of liability clause and the warranty disclaimer were unconscionable, the circuit court did not expand the Liability Defendants' duties under tort law because those obligations and duties already existed prior to the issuance of the circuit court's order.

The circuit court did not violate the FIFRA by concluding that the limitation of liability clause and the warranty disclaimer were unconscionable. The FIFRA cannot be interpreted to allow a manufacturer to avoid tort liability merely by placing a disclaimer on a label. In other words, a manufacturer of a fungicide cannot escape tort liability by placing a disclaimer on a label and then claiming preemption under the FIFRA.

Accordingly, we affirm the circuit court's orders (1) partially granting the Liability Defendants' motion for

partial summary judgment regarding FIFRA preemption issues, and (2) denying the Liability Defendants' motion for partial summary judgment as to breach of warranty claims. *Maguire*, 79 Hawai'i at 112, 899 P.2d at 395. Furthermore, we hold that the circuit court did not, as a result of these two summary judgment orders, allow the jury to impose liability pursuant to claims that the FIFRA preempted.

B. Whether the Circuit Court Denied the Liability Defendants a Fair Trial

The Liability Defendants contend that the circuit court denied the Liability Defendants a fair trial through the cumulative effect of the following three alleged errors: (1) sanctioning one of the Liability Defendants, DuPont, for its discovery misconduct by instructing the jury that it could consider DuPont's discovery misconduct in deciding the merits of the case; (2) denying the Liability Defendants' motions to realign the parties; and (3) denying the Liability Defendants' motion for a mistrial after counsel for the Plaintiffs referred to a verdict against DuPont in another case. We disagree.

The fourteenth amendment to the United States Constitution and article 1, section 5, of the Hawai'i Constitution guarantee that no person shall be deprived of life, liberty, or property without due process, "and a fair trial in a fair tribunal is a basic requirement of due process." *State v. Brown*, 70 Haw. 459, 466, 776 P.2d 1182, 1187 (1989) (citation, internal quotation marks, and original brackets omitted). Thus, the Liability Defendants draw our attention to *State v. Soares*, 72 Haw. 278, 815 P.2d 428 (1991), as

an example of how the cumulative effect of errors can result in the denial of a fair trial. In *Soares*, "[a]lthough no single instance of prosecutorial misconduct substantially prejudiced appellants' right to a fair trial," we held "that the cumulative weight of the prosecutor's improper conduct was so prejudicial as to deny appellants a fair trial." *Id.* at 283, 815 P.2d at 431. As our individual analysis of the three instances of alleged errors shows, in two instances, the circuit court did not err, and, in the third instance, the circuit court's error was harmless. In light of the overwhelming and substantial evidence supporting the jury's verdict, we hold that the cumulative effect of the three alleged errors did not deny the Liability Defendants their constitutional right to a fair trial.

1. The Circuit Court's Instruction that the Jury Could Consider DuPont's Discovery Misconduct in Deciding the Merits of the Case

With respect to the Liability Defendants' contention that the circuit court deprived them of their right to a fair trial by giving the jury an erroneous remedial jury instruction, we initially note that a "circuit court is given broad discretion in determining the sanctions to be imposed pursuant to [HRCP] Rule 37(b)(2)." *Wong v. City and County of Honolulu*, 66 Haw. 389, 394, 665 P.2d 157, 161 (1983). A circuit "court's imposition of a discovery abuse sanction is reviewable on appeal for abuse of discretion. A [circuit] court abuses its discretion whenever it exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party." *Aloha Unlimited, Inc. v. Coughlin*, 79 Hawai'i 527, 532-33,

904 P.2d 541, 546-47 (App.1995) (citation and internal quotation marks omitted).

The circuit court gave the remedial jury instruction as a sanction for DuPont's discovery misconduct involving the Alta documents. In October 1994, during the defense phase of the trial, the Plaintiffs learned that plaintiffs in a Benlate-related case in Texas had obtained six boxes of Alta documents relating to testing of soils for Benlate contamination that DuPont had failed to produce in response to previous discovery requests by the Plaintiffs in the instant case. As a result, the Plaintiffs moved for sanctions against DuPont, alleging that DuPont should have previously produced all of these Alta documents during the discovery phase of this litigation. The circuit court granted the Plaintiffs' motion, finding that DuPont had intentionally withheld the information and documents. The circuit court eventually sanctioned DuPont by, among other things, reading the following remedial instruction to the jury: "In considering the issues of this case, you may consider Defendant Du Pont's withholding of this evidence and give it the weight, if any, you deem appropriate." The Liability Defendants contend that, in so doing, the circuit court erred because the remedial jury instruction, in effect, allowed the jury to impose sanctions against the Liability Defendants.

Under HRCP Rule 37(b)(2), the circuit court may sanction a party for failing to comply with a discovery order. In addition to its authority under HRCP Rule 37(b)(2), a circuit court may sanction parties for abusive litigation practices in a proceeding before it in accordance with HRS § 603-21.9(1) and (6) (1993) and its inherent powers. *Azer v. Courthouse Racquetball Corp.*, 9 Haw.App.

530, 549, 852 P.2d 75, 86 (1993). For example, under HRS § 603-21.9(1) and (6),

> [t]he several circuit courts shall have power:
>
> (1) To make and issue all orders and writs necessary or appropriate in aid of their original or appellate jurisdiction;
>
> . . . .
>
> (6) To make and award such judgments, decrees, orders, and mandates, issue such executions and other processes, and do such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to them by law or for the promotion of justice in matters pending before them.

Additionally, we have specifically noted that

> courts have inherent equity, supervisory, and administrative powers as well as inherent power to control the litigation process before them. Inherent powers of the court are derived from the state Constitution and are not confined by or dependent on statute. Among courts' inherent powers are the powers to create a remedy for a wrong even in the absence of specific statutory remedies, and to prevent unfair results. The courts also have inherent power to curb abuses and promote a fair process which extends to the preclusion of evidence and may include dismissal in severe circumstances. It follows that if the trial court has the inherent power to level the ultimate sanction of dismissal, it necessarily has the power to take all reasonable steps short of dismissal, depending on the equities of the case.

Richardson v. Sport Shinko (Waikiki Corp.), 76 Hawai'i 494, 507, 880 P.2d 169, 182 (1994) (citations, internal quotation marks, original brackets, and footnote omitted).

The Plaintiffs in the instant case cite Richardson in support of their position that the circuit court did not err by giving the remedial jury instruction. In *Richardson*, the plaintiff suffered an injury in a hotel when she knelt down on a staple hidden in the carpeting of a hotel conference room. Although the defendant hotel failed to comply with discovery by not producing an original copy of an incident report that the hotel manager had prepared as a result of the accident, the trial court rejected the plaintiff's proposed remedial jury instruction addressing the defendant's discovery misconduct:

> During the testimony of [the defendant]'s employee Mary Guerrero, a copy of an Incident Report which Mary Guerrero testified she wrote was marked as Plaintiff's Exhibit 25. The original Incident Report written by Mary Guerrero was and still may be in the custody and control of [the defendant], but the original document was never produced by [the defendant]. The original document may have contained information different from the information in Exhibit 25. The jury may consider the absence of the original Incident Report and [the defendant]'s failure to produce the original report in its deliberations, and may infer from the absence of the original report that it contained information favorable to the Plaintiffs in this case.

Id. at 506, 880 P.2d at 181. However, on appeal, we specifically noted that the "trial court had the inherent power to provide a remedial jury instruction addressing the loss

of the original incident report if it deemed such a measure appropriate." *Id.* at 508, 880 P.2d at 183. In reaching our holding, we reiterated three factors that we had utilized in determining whether a discovery sanction was appropriate: (1) the offending party's culpability, if any, in destroying or withholding discoverable evidence that the opposing party had formally requested through discovery; (2) whether the opposing party suffered any resulting prejudice as a result of the offending party's destroying or withholding the discoverable evidence; and (3) the inequity that would occur in allowing the offending party to accrue a benefit from its conduct. *Id.* at 507, 880 P.2d at 182.

Applying these three factors to the instant case: (1) the circuit court specifically found that DuPont had intentionally withheld numerous documents in blatant violation of previous court orders compelling discovery of those documents; (2) because the documents could be interpreted as demonstrating liability on the part of the Liability Defendants, DuPont's withholding these documents prejudiced the Plaintiffs; and (3) it would be inequitable for DuPont to benefit from its own discovery misconduct and the Plaintiffs' inability to acquire possession of inculpating documents prior to the commencement of trial. Based on the three factors that we utilized in *Richardson*, severe sanctions against DuPont for its inexcusable discovery misconduct were clearly justified.

However, the facts of *Richardson* are distinguishable from the instant case. While the defendant in *Richardson* never produced the original copy of the incident report, DuPont eventually did produce, albeit belatedly, the Alta documents. Furthermore, the power to sanction a party

for discovery misconduct is within the exclusive province of the circuit court, not the jury. This is self-evident from a reading of HRCP Rule 37(b), which allows the circuit court to sanction a party that fails to "obey an order to provide or permit discovery." *See also* HRS §§ 603-21.9(1) and (6) (1993). The circuit court disregarded this principle and, thus, abused its discretion by instructing the jurors that they could consider DuPont's withholding of the Alta documents and give it any weight they deemed appropriate.

Nevertheless, in light of the overwhelming evidence that supported the jury's verdict, a California appellate court's decision in *Vallbona v. Springer*, 43 Cal.App.4th 1525, 51 Cal.Rptr.2d 311 (1996), is instructive. In *Vallbona*, a physician's former patients alleged fraud against the physician, his wife, and a clinic. The physician had performed a controversial medical procedure, and, although he initially claimed that he had indirectly applied for federal approval of the controversial medical procedure, he subsequently took the position that he could not comply with the plaintiffs' discovery requests to produce the application documents because the documents had been stolen. However, some of the purportedly stolen documents eventually turned up during trial. As a result, the trial court sanctioned the physician by instructing the jury that the physician had no pending application for federal approval of his disputed medical procedure and no empirical data to substantiate his claims in his brochures on the medical procedure rather than otherwise allowing the jurors to make this factual determination for themselves. *Id.* 51 Cal.Rptr.2d at 325. On appeal, the California Court of Appeals held that the trial "court

acted within its discretion [by] imposing the issue sanction tailored to the defendants' particular discovery misuse and in implementing that sanction by instructing the jury that various facts should be taken as established against defendants." *Id.* at 326-27. More significantly, however, the *Vallbona* court stated that "even if we deemed the challenged special jury instruction to be error, we would conclude defendants suffered no prejudice since on this record it is not reasonably likely an outcome more favorable to defendants would have resulted absent any such error." *Id.* at 327.

We agree with the *Vallbona* court's statement that, even when a trial court abuses its discretion in a civil trial by giving the jury an inappropriate remedial instruction, we will nevertheless affirm the jury's verdict when it appears from the record as a whole that it is not reasonably likely that an outcome more favorable to the defendant would have resulted absent the error, and, thus, the defendant suffered no prejudice. As we have previously stated, "erroneous instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial." *State ex rel. Bronster v. United States Steel Corp.*, 82 Hawai' [sic] PCITE, 86 Hawai'i 244 Hawai'i 32, 51, 919 P.2d 294, 313 (1996) (emphasis added) (citations and internal quotation marks omitted).

The evidence adduced at trial overwhelmingly supported the jury's verdict regarding liability, damages, and punitive damages. We hold that, under the circumstances of this case, it affirmatively appears from the record as a whole that *DuPont* and the other Liability Defendants did

not suffer prejudice as a result of the circuit court's inappropriate remedial jury instruction. Thus, although the circuit court abused its discretion through this particular sanction, we hold that the circuit court's error was harmless.

2. The Circuit Court's Denial of the Liability Defendants' Motions to Realign the Parties

The Liability Defendants contend that the circuit court denied the Liability Defendants a fair trial by denying the Liability Defendants' motions to realign the parties. We disagree.

A circuit court has the discretion to realign the parties at any stage of the action and on such terms as are just. *Cawthon v. Waco Fire and Cas. Ins. Co.*, 259 Ga. 632, 386 S.E.2d 32, 33 (1989). A trial court's ruling on a motion for realignment is reviewed under the abuse of discretion standard. *Id.*

Although the Liability Defendants assert that the circuit court's failure to realign the parties resulted in "manifest and severe prejudice" to *DuPont* and the other Liability Defendants, the only form of prejudice to which the Liability Defendants specifically refer is the fact that the circuit court allocated two of the defense's eight total peremptory challenges to the Declaratory Defendants. In support of their argument, the Liability Defendants primarily rely on *Cawthon, supra*. In *Cawthon*, an automobile struck and killed the Cawthons' son while he was attempting to cross a three-lane highway to catch a school bus. Waco Fire and Casualty Insurance Co. (Waco) had issued an insurance policy to the board of education

covering school bus accidents. While the Cawthons' wrongful death action was pending, Waco filed a declaratory action against the Cawthons and the board of education, seeking a determination that the insurance policy did not cover the accident. Before trial, the Cawthons moved the trial court to realign the board of education as a plaintiff, i.e., a co-plaintiff with Waco. In particular, the Cawthons were concerned that they would otherwise be forced to share half of their "jury strikes," i.e., peremptory challenges, with the board of education, whose interests were clearly adverse to the Cawthons' interests. The trial court denied the motion to realign because "it had no authority to realign parties." *Id.* 386 S.E.2d at 33. However, the Georgia Supreme Court reversed, holding that the trial court did have "the discretion to realign the parties in the interest of justice." The *Cawthon* court noted "that multiple parties that are aligned on the same side of a case and have adverse interests are not entitled to additional peremptory strikes[.]" *Id.* Thus,

> if the trial court had exercised its discretion and denied the Cawthons' motion to realign, the denial would have been an abuse of discretion under the circumstances of this case. Those circumstances include the fact that the denial would have given (as did the court's failure to exercise its discretion) the Cawthons only three jury strikes, but would have given the parties asserting contrary legal and factual contentions nine jury strikes.

Id.

However, the instant case is distinguishable from *Cawthon* in that, unlike the co-parties in *Cawthon*, the

Liability Defendants did not have to split half of the defense's eight total peremptory challenges with their co-defendants, the Declaratory Defendants. The circuit court allocated only two of the defense's eight peremptory challenges to the declaratory defendants, and, thus, the Liability Defendants retained the remaining six peremptory challenges for themselves. Meanwhile Kawamata Farms and the Tomono Plaintiffs shared a total of eight peremptory challenges. Therefore, the effect of the circuit court's denying the motions to realign in the instant case was much less severe for the Liability Defendants than it was for the co-parties in *Cawthon*. Although the Liability Defendants had two less peremptory challenges than the Plaintiffs,

> [e]xact numerical equality between sides is not the purpose of equalization of peremptory challenges. Rather, the purpose is to equalize the positions of the parties to prevent one side, antagonistic among the parties on certain matters of fact with which they will be concerned, but primarily united in opposition to the other side, from selecting the jury.

Diamond Shamrock Corp. v. Wendt, 718 S.W.2d 766, 769 (Tex.Ct.App.1986) (citation omitted).

Under HRS § 635-29(b) (1993), a circuit court is authorized to require co-parties to share peremptory challenges:

> § 635-29 Challenging peremptorily. . . .
>
> (b) In civil cases each party shall be allowed to challenge peremptorily three jurors, without assigning any reason therefor. Where there are

> two or more plaintiffs or two or more defendants, they may be considered as a single party for the purposes of making peremptory challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly. If additional peremptory challenges are allowed to the parties on one side, the opposing party or parties may be allowed additional peremptory challenges.
>
> . . . .

(Emphasis added). "The determination of whether the trial court erred in allocation [of peremptory challenges] is made at the time it makes its decision and not upon hindsight." *American Cyanamid Co. v. Frankson*, 732 S.W.2d 648, 653 (Tex.Ct.App.1987) (citation omitted). Moreover,

> a judgment will not be reversed unless the error in awarding peremptory challenges to a litigant, or to multiple litigants having the same interest, is shown to be prejudicial. In order to prove the existence of prejudice, the complaining party must show that it exhausted his peremptory challenges and that a prospective juror, who the challenging party would have otherwise stricken, served on the jury.

Carter v. Tom's Truck Repair, Inc., 857 S.W.2d 172, 177-78 (Mo.1993) (citations omitted).

The Liability Defendants have neither shown that they exhausted their peremptory challenges nor that a prospective juror, whom they would have otherwise challenged, served on the jury. Therefore, the Liability Defendants' argument, i.e., that the circuit court's denial of the

motions for realignment adversely affected the number of peremptory challenges at their disposal, lacks merit.

Under these circumstances, the circuit court did not clearly exceed the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of the Liability Defendants by denying their motions to realign the parties. Therefore, the circuit court did not abuse its discretion, and we affirm the circuit court's orders denying these motions.

3. The Circuit Court's Denial of the Liability Defendants' Motion for a Mistrial Following Plaintiffs' Counsel's Reference to a Verdict against *DuPont* in Another Case

The Liability Defendants contend that the circuit court deprived the Liability Defendants of a fair trial by denying their motion for a mistrial after the Plaintiffs' counsel referred to a verdict from another case against *DuPont*. We disagree.

"A motion for mistrial should be granted when there is an occurrence of such character and magnitude that a party is denied the right to a fair trial." *Aga v. Hundahl*, 78 Hawai'i 230, 245, 891 P.2d 1022, 1037 (1995). "Appellate review of a trial court's ruling on a motion for mistrial is under the abuse of discretion standard." *Id.*

During opening statements in the instant case, counsel for the Plaintiffs made the following reference to a verdict against *DuPont* in a Texas case, *Peterson Brothers, Inc. v. E.I. DuPont De Nemours and Co.* and *Greenlight Chemical Co.*, ~~Case~~ No. 91-CI-12100, 24th Judicial District

Court of Bexar County, Texas (hereinafter *"Greenlight"*), involving Benlate:

> [COUNSEL FOR PLAINTIFFS]: . . . Du Pont – Du Pont had a case in the '80's in Texas involving an allegation that Benlate had the same kind of – gaseous something was coming off the DBU was coming off. We haven't put the whole memo up here. But this is the last page of the memo that talks about that litigation.
>
> And in this case, where they actually went to court, and they had a verdict against them, this –
>
> [COUNSEL FOR DUPONT]: Excuse me, Your Honor, that is highly improper, and [counsel for the Plaintiffs] knows that.

Following the objection, counsel for DuPont moved for a mistrial. After hearing the parties' arguments regarding the relevance of the verdict, the circuit court concluded that some issues in *Greenlight* were relevant to the instant case, and, thus, denied the motion for a mistrial.

The Liability Defendants argue that the circuit court erred by denying the motion for a mistrial because "[a] jury is likely to give a prior verdict against the same defendant more weight than it warrants. The admission of a prior verdict creates the possibility that the jury will defer to the earlier result and this will, effectively, decide a case on evidence not before it." *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1351 (3d Cir.1975). In response, the Plaintiffs assert that, even assuming, arguendo, that the circuit court erred by basing its denial

of the motion on its conclusion that some issues in *Greenlight* were relevant to the instant case, such error was harmless, because the reference by the Plaintiffs' counsel was not an occurrence of such character and magnitude that it denied the Liability Defendants their right to a fair trial.

In support of their argument, the Plaintiffs cite to *Harned v. Dura Corp.*, 665 P.2d 5 (Alaska 1983), in which a plaintiff brought a products liability suit against the successor of an alleged manufacturer of a portable compressed air tank to recover for injuries that he sustained when the tank exploded. During opening statements at the trial, defense counsel made a reference to other verdicts from similar cases in which the manufacturer had prevailed. When the plaintiff subsequently attempted to introduce testimony that would have rebutted defense counsel's opening statement about the other verdicts, the trial court sustained defense counsel's objection that such rebuttal testimony was irrelevant, and, during closing arguments, the trial court additionally refused to allow the plaintiff to offer a rebuttal argument regarding the other verdicts. On appeal, the Alaska Supreme Court noted that "prior verdicts are not relevant in subsequent trials involving different parties and factual settings. It follows that it [wa]s improper for [defense] counsel to advert to the disposition of the same or similar cases during argument to the jury." *Id.* at 8. "The propriety of references to the disposition of prior cases must be distinguished from the propriety of references to the incidents which generated such litigation." *Id.* at 8 n. 8. Because defense counsel's reference to the other verdicts was

improper, the plaintiff's proffered "testimony or argument should have been allowed under the doctrine of curative admissibility." *Id.* at 9 (internal quotation marks and footnote omitted). Nevertheless, the *Harned* court held that this error was harmless because "the exclusion of [the plaintiff]'s rebuttal evidence and argument [wa]s not sufficiently prejudicial to warrant reversal." *Id.* (citations omitted).

> Our conclusion that the error was harmless rests on the fact that a week intervened between opening arguments and submission of the case to the jury for deliberation. During that period, the jury heard several days of testimony from numerous witnesses. Throughout this testimony, no further mention was made regarding prior litigation, nor was the questioned statement reiterated by [defense] counsel during closing argument. Of further significance is the fact that the jury was specifically instructed it was "to consider only the evidence in the case" and that "statements and arguments of Counsel are not evidence in this case." Thus we think it unlikely that the jury ignored all the testimony which was produced as well as the trial court's admonition, and reached its decision on the basis of an ambiguous remark made by [defense] counsel in his opening argument. Under these circumstances, we conclude that [the plaintiff] was not substantially prejudiced by the exclusion of rebuttal evidence or argument he sought to make. Therefore, we hold that the superior court's ruling did not constitute prejudicial error.

Id. at 10 (original brackets omitted).

We agree with the *Harned* court that it is generally improper for counsel to refer to other verdicts during opening statements. The reference by the Plaintiffs' counsel to the *Greenlight* verdict was improper. Therefore, it was error for the circuit court to base its denial of the Liability Defendants' subsequent motion for a mistrial on its conclusion that some issues in *Greenlight* were relevant to the instant case. However, "[o]rdinarily a prevailing party's opening statement is not a ground for reversal unless the adversary's substantive rights have been prejudiced." *Lussier v. Mau-Van Development, Inc.*, 4 Haw.App. 359, 394, 667 P.2d 804, 827 (1983) (citations omitted). In order to warrant a mistrial, the improper reference to the *Greenlight* verdict had to constitute an occurrence of such character and magnitude that it denied the Liability Defendants their right to a fair trial. *Aga*, 78 Hawai'i at 245, 891 P.2d at 1037.

As in *Harned*, the improper reference by the Plaintiffs' counsel to the verdict in *Greenlight* was extremely brief during the Plaintiffs' opening statement. Furthermore, the Liability Defendants do not claim that the Plaintiffs' counsel subsequently made any further references to the verdict in *Greenlight* during the remainder of the seven-month trial, which was much longer in duration than the one week trial in *Harned*.

The Plaintiffs also note that the circuit court instructed the jury throughout trial that the statements of counsel were not evidence. As a rule, we presume that the jury followed the circuit court's instructions. *Knight*, 80 Hawai'i at 327, 909 P.2d at 1142; *Tawata*, 79 Hawai'i at 21, 897 P.2d at 948.

Therefore, in light of the brevity of the improper reference to the *Greenlight* verdict by the Plaintiffs' counsel during his opening argument, the seven-month duration of the trial, the circuit court's instructions to the jury, and the overwhelming evidence in the record supporting the jury's verdict, we hold that, although it was improper for the Plaintiffs' counsel to refer to the verdict in *Greenlight* during opening statements, this reference did not constitute an occurrence of such character and magnitude that it denied the Liability Defendants their right to a fair trial. *Aga*, 78 Hawai'i at 245, 891 P.2d at 1037. Although we might not agree with all of the circuit court's reasoning in denying the Liability Defendants' motion for a mistrial, "where the circuit court's decision is correct, its conclusion will not be disturbed on the ground that it gave the wrong reason for its ruling." *Delos Reyes v. Kuboyama*, 76 Hawai'i 137, 140, 870 P.2d 1281, 1284 (1994) (citations omitted). Accordingly, we hold that the circuit court did not abuse its discretion by denying the Liability Defendants' motion for a mistrial.

In summary, although the circuit court made some errors in the trial, such errors were harmless and insubstantial. We hold that the circuit court did not deny the Liability Defendants their constitutional right to a fair trial by: (1) sanctioning one of the Liability Defendants, *DuPont*, for its discovery misconduct by instructing the jury that it could consider *DuPont*'s discovery misconduct in deciding the merits of the case; (2) denying the Liability Defendants' motions to realign the parties; and (3) denying the Liability Defendants' motion for a mistrial after the Plaintiffs' counsel referred to the *Greenlight* verdict against *DuPont*.

C. The Circuit Court's Discovery Sanctions against *DuPont*

The Liability Defendants contend that the circuit court reversibly erred by imposing the following discovery sanctions against *DuPont*: (1) a $1.5 million fine, payable to the State of Hawai'i; and (2) an order lifting previous protective orders regarding allegedly privileged documents. A "circuit court is given broad discretion in determining the sanctions to be imposed pursuant to [HRCP] Rule 37(b)(2)." *Wong*, 66 Haw. at 394, 665 P.2d at 161. Circuit courts also have broad discretion to sanction litigants pursuant to their "inherent equity, supervisory, and administrative powers as well as inherent power to control the litigation process before them." *Richardson*, 76 Hawai'i at 507, 880 P.2d at 182. A circuit "court's imposition of a discovery abuse sanction is reviewable on appeal for abuse of discretion." *Aloha Unlimited, Inc.*, 79 Hawai'i at 532-33, 904 P.2d at 546-47 (citation and internal quotation marks omitted). We review these two sanctions in turn.

1. The $1.5 Million Sanction against *DuPont*

The Liability Defendants' only allegation of error regarding the $1.5 million discovery sanction against *DuPont* is their contention, raised for the first time on appeal, that the circuit court violated DuPont's constitutional rights. The Liability Defendants claim that, because the circuit court made the $1.5 million sanction against DuPont payable to the State of Hawai'i, the fine constituted a criminal contempt sanction, and, thus, the circuit court should have provided DuPont with the criminal

contempt procedural protections that are guaranteed under the United States Constitution, the Hawai'i Constitution, and HRS § 710-1077 (1993).

The record indicates that the Liability Defendants failed in the circuit court to raise the issue of whether the court was complying with criminal contempt procedural protections pursuant to the United States Constitution, the Hawai'i Constitution, and/or HRS § 710-1077. Although the Liability Defendants raised other objections to the $1.5 million sanction based on other specific grounds, "the making of an objection upon a specific ground is a waiver of all other objections." *State v. Matias*, 57 Haw. 96, 101, 550 P.2d 900, 904 (1976) (citation and internal quotation marks omitted). "The general rule is that an issue which was not raised in the lower court will not be considered on appeal." *Kernan v. Tanaka*, 75 Haw. 1, 35, 856 P.2d 1207, 1224 (1993) (citation and internal quotation marks omitted), *cert. denied*, 510 U.S. 1119, 114 S.Ct. 1070, 127 L.Ed.2d 389 (1994); *Mauna Kea Power Co., Inc. v. Board of Land and Natural Resources*, 76 Hawai'i 259, 262 n. 2, 874 P.2d 1084, 1087 n. 2 (1994); *Birmingham v. Fodor's Travel Publications, Inc.*, 73 Haw. 359, 371, 833 P.2d 70, 77 (1992); *State v. Ildefonso*, 72 Haw. 573, 584, 827 P.2d 648, 655 (1992); *State v. Hoglund*, 71 Haw. 147, 150-51, 785 P.2d 1311, 1313 (1990).

> There are sound reasons for the rule. It is unfair to the trial court to reverse on a ground that no one even suggested might be error. It is unfair to the opposing party, who might have met the argument not made below. Finally, it does not comport with the concept of an orderly and efficient method of administration of justice.

Ellis v. State, 36 Ark.App. 219, 821 S.W.2d 56, 57 (1991).

Thus, for example, after a federal district court imposed a $125,000 contempt sanction against the City of Philadelphia (City) for the City's failure to comply with the district court's earlier order requiring the City to maintain a 90 percent occupancy rate in a residential drug treatment facility, the United States Court of Appeals for the Third Circuit rejected the City's constitutional argument, raised for the first time on appeal, that the district court violated due process by imposing "the contempt sanction without affording it adequate notice or hearing." *Harris v. City of Philadelphia*, 47 F.3d 1333, 1338 (3d Cir.1995).

> The City raised no due process arguments in the district court, either at the June 11, 1993 hearing or in its motion for reconsideration. This court generally refuses to consider issues raised for the first time on appeal. The City has put forward no reason why we should disregard our strong policy in favor of allowing district courts to decide such issues in the first instance when there was no obstacle to their review in the district court, and thus the City's waiver of its due process argument is a sufficient basis to reject its contention.

Id. at 1339 (citations and internal quotation marks omitted).

Thus, when a party fails to raise an issue about the constitutionality of a contempt sanction before the trial court, the reviewing appellate courts may deem the constitutional issue waived. *See, e.g., In re Grand Jury Proceedings*, 875 F.2d 927, 932 (1st Cir.1989) ("[The appellant]'s failure to object in the district court deprived him of any

right to raise these matters on appeal." (Citations omitted.)); *Yarbrough v. Yarbrough*, 295 Ark. 211, 748 S.W.2d 123, 124 (1988) (rejecting an appellant's contention that his sentence constituted cruel and unusual punishment because he did not raise that issue before the trial court); *Ellis*, 821 S.W.2d at 57 (rejecting a defendant's argument that there was no notification of the contempt proceeding, because the defendant failed to present this argument to the trial court); *In re Smith*, 211 Ga.App. 493, 439 S.E.2d 725, 728 (1993) (holding that any defense involving the insufficiency of service of process on the appellant was clearly waived when he failed to raise this issue at the time of pleading); *McCarthy v. Iowa Dist. Court for Jefferson County*, 386 N.W.2d 122, 127 (1986) (holding that the issue of a plaintiff's self-incrimination could not be addressed on appeal because it was waived at the district court level); *Ex Parte Bowers*, 886 S.W.2d 346, 348 (Tex.Ct.App.1994) (rejecting a petitioner's contention that he never received notice of the motion for contempt, but only notice of the show of cause hearing, because this issue was never raised before the trial court, and, thus, it was waived).

The record indicates that, like some of the appellants in the above cases, DuPont had ample opportunity on multiple occasions to raise the issue before the circuit court of whether the circuit court, by issuing a $1.5 million sanction against DuPont, was complying with criminal contempt procedural protections pursuant to the United States Constitution, the Hawai'i Constitution, and/or HRS § 710-1077. However, at oral arguments and in their appellate briefs, the Liability Defendants failed to show that they raised this issue before the circuit court.

Because the Liability Defendants failed to raise the issue regarding the constitutionality of the $1.5 million sanction before the circuit court, we hold that the Liability Defendants have waived this alleged error. Therefore, we affirm the $1.5 million sanction against DuPont.

2. The Order Lifting Previous Protective Orders

The Liability Defendants contend that the circuit court abused its discretion in sanctioning *DuPont* by ordering that protective orders concerning the confidentiality of *DuPont* documents be lifted with the exception of those documents which contained trade secrets. We disagree.

We have utilized the following three factors in determining whether a discovery sanction was appropriate: (1) the offending party's culpability, if any, in destroying or withholding discoverable evidence that an opposing party had formally requested through discovery; (2) whether the opposing party suffered any resulting prejudice as a result of the offending party's destroying or withholding the discoverable evidence; and (3) the inequity that would occur in allowing the offending party to accrue a benefit from its conduct. *Richardson*, 76 Hawai'i at 507, 880 P.2d at 182. Applying these three factors to the instant case, we note that: (1) the circuit court specifically found that DuPont had intentionally withheld numerous documents in blatant violation of previous court orders compelling discovery of those documents, and, thus, DuPont was culpable in withholding the documents; (2) because the documents could be interpreted as demonstrating liability on the part of the Liability Defendants,

DuPont's withholding these documents prejudiced the Plaintiffs; and (3) it would have been inequitable for *DuPont* to benefit from its own discovery misconduct and the Plaintiffs' inability to acquire possession of the inculpating documents prior to the commencement of trial. *DuPont* theoretically could have prevailed against the Plaintiffs as a direct result of its pattern of discovery abuse, which is a result that we will not tolerate in the courts of Hawai'i. Based on the three factors that we utilized in *Richardson*, *DuPont* clearly deserved severe discovery sanctions, including the order lifting protective orders concerning the confidentiality of *DuPont* documents.

The Liability Defendants cite *Richards v. Superior Court for Los Angeles County*, 86 Cal.App.3d 265, 150 Cal.Rptr. 77 (1978), in which a California Court of Appeal held that a trial court abused its discretion by dissolving an existing protective order as a sanction for a party's failure to supply a sufficiently detailed statement in response to a discovery request.

> While the trial judge is vested with discretion to impose sanctions for failure of compliance with discovery orders, the sanction imposed must be appropriate to the dereliction, must be authorized by the discovery statutes, and must not exceed that which is necessary to protect the interests of the party entitled to but denied discovery.

Id. 150 Cal.Rptr. at 79 (citation omitted). The *Richards* court held that, under the circumstances of that particular case, a "court may not deny [a party] the protection of [a

protective] order as a sanction for failure to comply with the mandates of the discovery statutes." *Id.* at 78.

However, the circumstances in *Richards* are distinguishable from the instant case. While the protective orders in the instant case applied to information and documents that the Plaintiffs had sought primarily for the purpose of the adjudication of their substantive claims against the Liability Defendants, the protective orders in *Richards* applied only to information and documents regarding the financial status of defendants that the plaintiffs in *Richards* had sought for the purpose of helping the trial court determine punitive damages. Thus, the *Richards* court granted the defendants' petition for writ of mandamus under the following rationale:

> Discovery seeking financial information by reason of a claim for punitive damages is one classic instance of the manner in which civil discovery is used to achieve a litigation advantage never contemplated when the methodology was introduced into pretrial procedure. Causes of action for punitive damages have become very easy to allege. Response to discovery seeking financial information places a severe burden on the responder. As a minimum, there is the time and expense necessary to the compilation of a complex mass of information unrelated to the substantive claim involved in the lawsuit and relevant only to the subject matter of a measure of damages which may never be awarded. In addition, there is usually the potential that untoward disclosure of the information obtained may in some way or other react

> adversely against the disclosing party for reasons totally unrelated to the lawsuit. The possibilities run all the way from greater exposure to the not so gentle solicitations of some charitable organizations to the possibility of damage to the discloser in the competitive business arena.
>
> . . . .
>
> Given the presently broad test of discoverable matter, the burden incident to the compilation of information that may never be of value to any one seems built into the process. The potential of untoward disclosure of the financial information obtained in the discovery process is not. It seems a rare instance indeed that the potential of disclosure for purposes unrelated to the lawsuit or to persons other than counsel and their representatives serves any purpose except to give a tactical edge to the party who has obtained discovery of the information by allowing that party the benefit of pressure in settlement negotiations by threat or implication of disclosure.
>
> We hence conclude that where a party is compelled in civil discovery to reveal financial information because the information is relevant to the subject matter of a claim for punitive damages, that party is, upon his motion, presumptively entitled to a protective order that the information need be revealed only to counsel for the discovering party or to counsel's representative, and that once so revealed, the information may be used only for the purposes of the lawsuit. The burden is upon the opposing party to establish a substantial reason why the order should be denied. That reason must be related to the lawsuit.

Id. at 80-81 (emphases added) (citations omitted).

As stated, the protective orders in the instant case were not the result of a limited attempt to discover information about DuPont's financial status for the narrow purpose of determining punitive damages. The protective orders in the instant case related to discoverable information and documents that were directly relevant to the Plaintiffs' efforts to prove their substantive claims for compensatory damages against the Liability Defendants.

More importantly, DuPont's dereliction in the instant case was much more extreme than the dereliction in *Richards*. The record shows that DuPont engaged in a pattern of discovery abuse by, among other things, violating the circuit court's discovery orders, "dumping" forty boxes of documents pursuant to one of the Plaintiffs' interrogatory requests, and intentionally withholding information and documents that *DuPont* should have produced during discovery. This inexcusable behavior by DuPont is very disturbing.

Accordingly, we hold that the circuit court did not abuse its discretion in sanctioning *DuPont* by ordering that protective orders concerning the confidentiality of *DuPont* documents be lifted with the exception of those documents that contained trade secrets.

D. The Circuit Court's Denial of DuPont's and Bartlo Packaging, Inc.'s Motion for a New Trial Based on the Allegation that the Plaintiffs Had Concealed Two Experts

The Liability Defendants contend that the circuit court erred by denying DuPont and Bartlo Packaging, Inc.'s (Bartlo) motion for a new trial in light of their

allegation that the Plaintiffs concealed two experts throughout the litigation. We disagree. "Both the grant and the denial of a motion for new trial is within the trial court's discretion, and we will not reverse that decision absent a clear abuse of discretion." *United States Steel Corp.*, 82 Hawai'i at 54, 919 P.2d at 316 (citations and internal quotation marks omitted).

DuPont and *Bartlo* moved for a new trial based on both newly discovered evidence and the alleged fraud, misrepresentation, or misconduct of the Plaintiffs. Other Liability Defendants joined their motion. The Liability Defendants asserted that the Plaintiffs had concealed the involvement of two expert scientists, Dr. Harry K. Tayama and Dr. David S. Koranski, throughout the trial by having failed to (1) identify either scientist in response to the Liability Defendants' pretrial discovery requests and (2) assert any privilege in doing so. Drs. Tayama and Koranski had investigated the damage to the Plaintiffs' plants and had studied, among other things, the phototoxicity of Benlate on plants. The circuit court denied the motion for a new trial, and, on appeal, the Liability Defendants claim that the circuit court erroneously based its denial on the standard for a new trial under *Orso v. City and County of Honolulu*, 56 Haw. 241, 534 P.2d 489, (1975), which applies to a motion for a new trial pursuant to HRCP Rule 60(b)(2) based on "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)[.]" HRCP Rule 60(b)(2).

> The authorities are in agreement that a new trial based on newly discovered evidence can be

> granted provided the evidence meet the following requirements: (1) it must be previously undiscovered even though due diligence was exercised; (2) it must be admissible and credible; (3) it must be of such a material and controlling nature as will probably change the outcome and not merely cumulative or tending only to impeach or contradict a witness.

Id. at 250, 534 P.2d at 494 (citations omitted). While the *Orso* standard governed the Liability Defendants' motion for a new trial to the extent that they were asserting it pursuant to HRCP Rule 60(b)(2), the Liability Defendants note that they also brought their motion for a new trial pursuant to HRCP Rule 60(b)(3), under which a court may relieve a party from a final judgment procured through the "fraud . . . , misrepresentation, or other misconduct of an adverse party." HRCP Rule 60(b)(3). According to the Liability Defendants, by basing its denial of the motion for a new trial on the Orso standard, the circuit court failed to apply the proper standard for the Liability Defendants' motion to the extent that they asserted it pursuant to HRCP Rule 60(b)(3).

However, "where the circuit court's decision is correct, its conclusion will not be disturbed on the ground that it gave the wrong reason for its ruling." *Delos Reyes*, 76 Hawai'i at 140, 870 P.2d at 1284 (citations omitted). Applying the circuit court's findings of fact to the standard for HRCP Rule 60(b)(3), we conclude that the circuit court's decision was correct.

HRCP Rule 60(b)(3) is essentially identical to Federal Rule of Civil Procedure (FRCP) Rule 60(b)(3). Where we have patterned a rule of procedure after an equivalent

rule within the FRCP, interpretations of the rule "by the federal courts are deemed to be highly persuasive in the reasoning of this court." *Harada v. Burns*, 50 Haw. 528, 532, 445 P.2d 376, 380 (1968) (footnote omitted). According to the United States Court of Appeals for the Ninth Circuit, "[u]nder [FRCP] Rule 60(b)(3), the movant must, (1) prove by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct [, and] (2) establish that the conduct complained of prevented the losing party from fully and fairly presenting his case or defense." *Jones v. Aero/Chem Corp.*, 921 F.2d 875, 878-79 (9th Cir.1990) (citation and internal quotation marks omitted); *Lafarge Conseils Et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1338 (9th Cir.1986); *Bunch v. United States*, 680 F.2d 1271, 1283 (9th Cir.1982). Based on the circuit court's findings of fact, the Liability Defendants failed to satisfy this two prong test.

We initially note that the Liability Defendants' argument with the circuit court's conclusion does not take issue with the circuit court's supporting findings of fact. "If a finding is not properly attacked, it is binding; and any conclusion which follows from it and is a correct statement of law is valid." *Wisdom v. Pflueger*, 4 Haw.App. 455, 459, 667 P.2d 844, 848 (1983). Although the Liability Defendants designated the circuit court's denial of their motion as a point of error in the section of their opening brief entitled "Statement of Points on Appeal," they neither quoted the circuit court's supporting findings of fact nor included a statement explaining why the findings of fact were allegedly erroneous. Under HRAP Rule 28(b)(4)(C), "[w]hen the point involves findings . . . of the

court below, those urged as error shall be quoted in their entirety and there shall be included a statement explaining why the findings of fact . . . are alleged to be erroneous." "Points not presented in accordance with this section will be disregarded, except that the court, at its option, may notice a plain error not presented." HRAP Rule 28(b)(4)(D). Because the Liability Defendants have failed to comply with HRAP Rule 28(b)(4)(C), they have waived any challenge regarding the findings of fact that support the circuit court's denial of their motion for a new trial, and, thus, the unchallenged findings of fact are binding upon the Liability Defendants. *Doe v. Roe*, 5 Haw.App. 558, 568, 705 P.2d 535, 545 (1985); *Burgess v. Arita*, 5 Haw.App. 581, 593, 704 P.2d 930, 939 (1985).

Among the unchallenged findings of fact, the circuit court specifically found that the Liability Defendants failed to support its allegations that the Plaintiffs committed fraud when the Plaintiffs identified Drs. Koranski and Tayama as consultants to prepare for trial instead of as experts who would testify at trial. The circuit court found that it had not ordered the Plaintiffs to disclose the identities of Drs. Koranski and Tayama or their work product. In pretrial discovery hearings, the Plaintiffs properly claimed the attorney work product privilege regarding their consultants' identities and work product pursuant to HRCP Rule 26(b). The Plaintiffs also appropriately preserved the attorney work product privilege regarding their consultants in their answers to the Liability Defendants' interrogatories. With regard to the Liability Defendants' allegations that the Plaintiffs failed to properly provide Benlate samples to the Liability Defendants for

testing, the circuit court found that the Plaintiffs' production of their Benlate samples to the Liability Defendants was proper and gave the Liability Defendants an adequate opportunity: (1) to obtain Benlate samples from the Plaintiffs; and (2) to perform appropriate tests on the samples for presentation at trial. Based on these findings, the circuit court concluded that the Liability Defendants' allegation of fraud on the part of the Plaintiffs was without merit. Thus, the record shows that the Liability Defendants failed to satisfy the first requirement under the HRCP Rule 60(b)(3) standard, i.e., that the movant prove by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct. *Jones*, 921 F.2d at 878-79.

The Liability Defendants also failed to satisfy the second requirement of the HRCP Rule 60(b)(3) standard, i.e., that the movant establish that the conduct complained of prevented the losing party from fully and fairly presenting its case or defense. *Jones*, 921 F.2d at 879. The circuit court specifically found that, even if it had ordered the disclosure of Drs. Koranski and Tayama's information, their testimony would not have been material and controlling, and probably would not have changed the outcome of the seven-month trial in light of numerous defense witnesses' testimony on the same issues. In addition, the circuit court found that the opinions of Drs. Tayama and Koranski about the phototoxicity of Benlate on plants appeared to be favorable to the Plaintiffs' case rather than the Liability Defendants' case. Thus, the conduct complained of did not prevent the Liability Defendants from fully and fairly presenting their case or defense.

The unchallenged findings of fact show that the Liability Defendants failed to satisfy the standard for a new trial under HRCP Rule 60(b)(3). Because the circuit court's unchallenged findings of fact were binding on the Liability Defendants in this appeal and supported the circuit court's conclusion to deny the motion for a new trial, the circuit court did not clearly exceed the bounds of reason or disregard rules or principles of law or practice to the substantial detriment of the Liability Defendants. Therefore, the circuit court did not abuse its discretion, and, accordingly, we affirm its order denying the Liability Defendants' motion for a new trial pursuant to HRCP Rule 60(b)(3).

E. The Circuit Court's Denial of the Liability Defendants' Post-Trial Motion for Judgment Notwithstanding the Verdict Regarding the Plaintiffs' Tort Claims Based on the Economic Loss Doctrine

The Liability Defendants contend that the circuit court erred by denying their post-trial motion for judgment notwithstanding the verdict regarding the Plaintiffs' tort claims under the economic loss doctrine. We disagree.

> It is well settled that denials of directed verdict or judgment notwithstanding the verdict (JNOV) motions are reviewed de novo. Verdicts based on conflicting evidence will not be set aside where there is substantial evidence to support the jury's findings. We have defined "substantial evidence" as credible evidence which is of sufficient quality and probative value to

> enable a person of reasonable caution to support a conclusion.
>
> In deciding a motion for directed verdict or JNOV, the evidence and the inferences which may be fairly drawn therefrom must be considered in the light most favorable to the nonmoving party and either motion may be granted only where there can be but one reasonable conclusion as to the proper judgment.

Takayama v. Kaiser Foundation Hosp., 82 Hawai'i 486, 495, 923 P.2d 903, 912 (1996) (citation, some internal quotation marks, and original brackets omitted).

In the instant case, the Liability Defendants filed a post-trial motion for judgment notwithstanding the verdict, asserting that, because the jury concluded that the Plaintiffs' injuries were a result of "economic loss," rather than damage to the soil or farm structures, the economic loss doctrine precluded Plaintiffs from any recovery in tort as a matter of law. The circuit court denied the motion, concluding, among other things, that "[t]he majority of Plaintiffs' compensatory damages awarded by the jury were for plant replacement costs for the damages to Plaintiffs' plant inventory [that] constitutes 'other property,' which therefore brings this case out of the realm of the economic loss doctrine."

The Liability Defendants correctly state that "the economic loss rule applies to bar recovery of pure economic loss in actions based on products liability." *United States Steel Corp.*, 82 Hawai'i at 45, 919 P.2d at 307 (holding, however, that, even where damages were purely economic, the economic loss doctrine did not preclude a cause of action based on negligent misrepresentation,

because such a claim did not sound in products liability). In *United States Steel Corp.*, we summarized a leading case, *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986), in pertinent part as follows:

> In *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986), the United States Supreme Court acknowledged the "economic loss" rule, effectively adopted the rationale of the California Supreme Court in *Seely v. White Motor Co.*, 63 Cal.2d 9, 45 Cal.Rptr. 17, 403 P.2d 145 (1965), and held that no products liability claim lies in admiralty when a commercial purchaser alleges injury only to the product itself, resulting in purely economic loss. In *East River*, a shipbuilder contracted with Transamerica to design, manufacture, and supervise the installation of turbines that would be the main propulsion units for four oil-transporting supertankers constructed by the shipbuilder. After each ship was completed, it was chartered to one of the petitioners. When the ships were put into service, the turbines on all four ships malfunctioned due to design and manufacturing defects. Only the products themselves were damaged. The petitioners filed suit against Transamerica, alleging causes of action sounding in products liability, seeking damages for the cost of repairing the ships and for income lost while the ships were out of service. The district court granted summary judgment in favor of Transamerica, and the court of appeals affirmed, holding that the petitioner's dissatisfaction with product quality did not state a claim cognizable in tort.

> The United States Supreme Court affirmed the circuit court, holding that a manufacturer in a commercial relationship has no duty under either a negligence or strict products liability theory to prevent a product from injuring itself.

United States Steel Corp., 82 Hawai'i at 39, 919 P.2d at 301 (emphases added).

However, the instant case is distinguishable from *East River*, because, in *East River*, only the defective products themselves suffered injury. In contrast, the Plaintiffs in the instant case did not claim that the defective product, Benlate, suffered injury, but, rather, that the defective Benlate injured their farm crops, i.e., the Plaintiffs' "other property."

In a similar case involving *DuPont*, a Florida District Court of Appeals held that where DuPont's "product Benlate[ ] caused damage to the tomato crop, . . . the [economic loss doctrine] is not applicable." *E.I. DuPont De Nemours v. Finks Farms*, 656 So.2d 171, 172 (Fla.Dist.Ct.App.1995). Like the Plaintiffs in the instant case, the plaintiff in *Finks Farms* was a farmer who had suffered damage to its tomato crop as a result of having applied defective Benlate, and, as a result, the plaintiff sued DuPont on the basis of strict and negligent product liability, claiming that there was "a manufacturing or design defect in Benlate and that the defect was the proximate cause of damage to its . . . crop." *Id.* at 172. After the plaintiff won a $693,917.21 judgment, *DuPont* appealed, contending that the economic loss doctrine barred the plaintiff's recovery for its purely economic loss. DuPont apparently argued that the tomato plants were the finished product, rather than the Benlate that

the plaintiff had earlier applied to the tomato plants. Therefore, according to DuPont, the tomato plants were not "other property." However, the *Finks Farms* court disagreed with DuPont, explaining as follows:

> [T]he [plaintiff] in the instant case bargained for Benlate as a finished product, and the finished product, not just a component of it, damaged other property. The other property consisted of the tomato plants and/or the land upon which the Benlate was sprayed. . . .
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> . . . .
>
> . . . [C]ontract principles are more appropriate than tort principles for recovering economic loss where there is no accompanying physical injury or property damage to other property. Where, however, as in the instant case, the finished product causes property damage to other property, the economic loss doctrine does not apply. The [plaintiff], therefore, was properly allowed to recover its damages in tort.

Id. at 172-73 (emphases added).

Likewise in the instant case, the Plaintiffs bargained for Benlate as the finished product, and this finished product damaged "other property" consisting of the Plaintiffs' crops upon which Benlate was applied. Where the finished product caused damage to other property, the economic loss doctrine does not apply, and, thus, the economic loss doctrine did not bar the Plaintiffs from recovering damages for their crop damage. Accordingly, the circuit court was correct, and we affirm its order denying the Liability Defendants' post-verdict motion for judgment notwithstanding the verdict.

F. The Plaintiffs' and Declaratory Defendants' Relief from Judgment Pursuant to HRCP Rule 60(b)(3)

After judgment was entered and the notice of appeal was filed in this case, the Plaintiffs and Declaratory Defendants learned about additional discovery fraud and misconduct on the part of DuPont and, as a result, they moved for relief from judgment and additional sanctions against DuPont pursuant to HRCP Rule 60(b)(3). Because the Liability Defendants' appeal before this court was already pending, the Plaintiffs moved for remand to allow the circuit court to enter its findings of fact, conclusions of law, and order regarding the Plaintiffs' and Declaratory Defendants' motion for HRCP Rule 60(b)(3) relief. We granted the Plaintiffs' motion to remand on August 19, 1996 and informed the parties that they could submit ten-page briefs limited to the propriety of the relief pursuant to the HRCP Rule 60(b)(3) motion. On August 22, 1996, the circuit court entered findings of fact, conclusions of law, and an order regarding the Plaintiffs' and Declaratory Defendants' motions for HRCP Rule 60(b)(3) relief and for sanctions against DuPont. On appeal, the Liability Defendants contend, because the Plaintiffs were the prevailing parties, that they were not entitled to affirmative relief from the judgment pursuant to HRCP Rule 60(b)(3) and, furthermore, that any newly discovered misconduct on the part of DuPont did not prevent the Plaintiffs and Declaratory Defendants from fully and fairly presenting their case and/or defense. We disagree.

HRCP Rule 60(b)(3) provides in relevant part:

> Rule 60. RELIEF FROM JUDGMENT OR ORDER.
>
> . . . .
>
> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

(Emphasis added).

"When interpreting rules promulgated by the court, principles of statutory construction apply." *State v. Baron*, 80 Hawai'i 107, 113, 905 P.2d 613, 619 (1995) (citation and internal quotation marks omitted).

The standard of review for statutory construction is well-established. The interpretation of a statute is a question of law which this court reviews de novo. In addition, our foremost obligation is to ascertain and give effect to the intention of the legislature[,] which is to be obtained primarily from the language contained in the statute itself. And where the language of the statute is plain and unambiguous, our only duty is to give effect to its plain and obvious meaning.

State v. Wells, 78 Hawai'i 373, 376, 894 P.2d 70, 73 (1995) (citations and internal quotation marks omitted).

There is no Hawai'i case authority dealing with a HRCP Rule 60(b)(3) motion based on fraud, misrepresentation, or misconduct related to discovery; however, Rule HRCP 60(b)(3) is essentially identical to FRCP Rule 60(b)(3), and where we have patterned a rule within the HRCP after an equivalent rule within the FRCP, interpretations of the rule "by the federal courts are deemed to be highly persuasive in the reasoning of this court." *Harada*, 50 Haw. at 532, 445 P.2d at 380 (1968) (footnote omitted).

In order to obtain relief from judgment "[u]nder [FRCP] Rule 60(b)(3), the movant must[ ] (1) prove by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct, [and] (2) establish that the conduct complained of prevented the losing party from fully and fairly presenting his case or defense." *Jones*, 921 F.2d at 878-79 (citation and internal quotation marks omitted); *Lafarge Conseils et Etudes, S.A.*, 791 F.2d at 1338; *Bunch*, 680 F.2d at 1283. Based on the circuit court's findings of fact, the Plaintiffs and Declaratory Defendants failed to satisfy the *Jones* two-prong test for relief from judgment.[7]

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[7] The circuit court stated in conclusions of law 17, 22, 27, and 30 that specific representations by DuPont to the circuit court, regarding DuPont's production of the Alta Bush Ranch documents and whether these documents were privileged under the attorney work product doctrine, were fraudulent by clear and convincing evidence. Although we have no reason to doubt this extremely disturbing finding, the Plaintiffs and Declaratory Defendants obviously could not prove by clear and convincing evidence that the Liability Defendants, as the losing parties, obtained a verdict through DuPont's discovery fraud, misrepresentation, and misconduct because the verdict was in

Additionally, according to federal courts, relief under FRCP Rule 60(b)(3), the federal equivalent of HRCP Rule 60(b)(3), "is available only to set aside a prior order or judgment; a court may not use Rule 60 to grant affirmative relief in addition to the relief contained in the prior order or judgment." 12 J. Moore, Moore's Federal Practice § 60.25 (3d Ed.1997) (footnote omitted); *United States v. One 1961 Red Chevrolet Impala Sedan, Serial No. 11837A177369*, 457 F.2d 1353, 1355 (5th Cir.1972) ("[T]he only relief that [can] be granted under Rule 60(b) [i]s the setting aside of the judgment."); *Adduono v. World Hockey Ass'n*, 824 F.2d 617, 620 (8th Cir.1987) ("Rule 60(b) is available . . . only to set aside a prior order or judgment. It cannot be used to impose additional affirmative relief."); *United States v. One Hundred Nineteen Thousand Nine Hundred Eighty Dollars ($119,980.00)*, 680 F.2d 106, 107 (11th Cir.1982) ("Rule 60(b) is available . . . only to set aside the prior order or judgment. It cannot be used to

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favor of the Plaintiffs and against the Liability Defendants. Although the Liability Defendants obtained a favorable verdict as to the Declaratory Defendants' cross-claims against them, the circuit court stated in finding of fact 97 that the Declaratory Defendants' cross-claim against DuPont was not adversely affected by DuPont's discovery misconduct. Thus the Plaintiffs and the Declaratory Defendants failed to satisfy the first requirement under the Jones test for relief from judgment.

In addition, because the Plaintiffs won a favorable verdict, and because DuPont's discovery misconduct did not adversely affect the Declaratory Defendants, the Plaintiffs and Declaratory Defendants also failed to satisfy the second requirement under the *Jones* standard for relief from judgment by having failed to establish that DuPont's discovery misconduct prevented a losing party from fully and fairly presenting their case or defense.

impose additional relief."). Under the interpretation of the federal courts, pursuant to HRCP Rule 60(b)(3), we could not grant affirmative relief to the Plaintiffs in the form of additional attorneys' fees and costs, but could only set aside the circuit court's HRCP Rule 60(b)(3) order.

However, notwithstanding their persuasiveness, interpretations of the FRCP by federal courts are by no means conclusive with respect to our interpretation of any rule within the HRCP. "Article VI, section 7 of the Hawai'i Constitution provides that the supreme court shall have power to promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedure and appeals, which shall have the force and effect of law." *Price v. Obayashi Hawaii Corp.*, 81 Hawai'i 171, 177, 914 P.2d 1364, 1370 (1996) (internal quotation marks and original brackets omitted).

> It is well settled that the trial court has a very large measure of discretion in passing upon motions under Hawai'i Rules of Civil Procedure (HRCP) Rule 60(b) and its order will not be set aside unless we are persuaded that under the circumstances of the particular case, the court's refusal to set aside its order was an abuse of discretion.

Hawai'i Hous. Auth. v. Uyehara, 77 Hawai'i 144, 147, 883 P.2d 65, 68 (1994) (citations, internal quotations marks and original brackets omitted). As the promulgator of the HRCP and the court of last resort in Hawai'i, we are the ultimate interpreter of HRCP Rule 60(b)(3) as long as our interpretation of HRCP Rule 60(b)(3) does not offend the United States Constitution.

The record shows that DuPont committed discovery fraud upon the circuit court and the other parties. Fraud upon the court "is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246, 64 S.Ct. 997, 1001, 88 L.Ed. 1250 (1944). A "trial court has a duty and a right to determine that its judgments are correct and accurately reflect the truth." *Potter v. Eli Lilly and Co.*, 926 S.W.2d 449, 453 (Ky.1996). "The highest verity, from considerations of public policy, is attributed to the records and judgments of courts as matters of evidence and they ought to be most carefully preserved and authenticated." *Id.* (citation and internal quotation marks omitted). "The judgment is the last word of the law in any judicial controversy." *Id.* (citations omitted). Therefore, "[f]raud, misrepresentation, and circumvention used to obtain a judgment are generally regarded as sufficient cause for the opening or vacating of the judgment." *Southwest Slopes, Inc. v. Lum*, 81 Hawai'i 501, 511, 918 P.2d 1157, 1167 (App.1996) (citation, internal quotation marks, and original brackets omitted).

In this case, considering the egregious nature of the fraud by DuPont, we construe the HRCP so as not to disallow a remedy under HRCP Rule 60(b)(3) when there is a post-judgment discovery of fraud supported by clear and convincing evidence. This interpretation of HRCP Rule 60(b)(3) departs from federal case law and sets a new precedent. However, the instant case presents an unusual, unique example of unprecedented discovery fraud perpetuated [sic] against the court. As a matter of

equity, it would be unfair to allow DuPont to escape accountability for its fraud, misrepresentation, and misconduct, simply by virtue of the fact that the Plaintiffs had the good fortune to somehow overcome DuPont's discovery fraud and obtain a favorable jury verdict.

Applying our interpretation of HRCP Rule 60(b)(3) to the present case, we must examine the circuit court's HRCP Rule 60(b)(3) order. As a result of DuPont's actions, the circuit court's HRCP Rule 60(b)(3) order: (1) sanctioned DuPont by awarding the Plaintiffs and the Declaratory Defendants additional attorneys' fees and costs incurred throughout the pretrial, trial, and post-trial proceedings relating to the misconduct that had not been previously been [sic] awarded as sanctions; (2) reaffirmed its prior punitive sanctions order and the $1.5 million sanction; and (3) amended its earlier findings of fact and conclusions of law (a) to accurately reflect the newly discovered examples of DuPont's discovery fraud and (b) to state how the circuit court would have ruled if the circuit court had known of DuPont's misconduct at the time the orders were issued (for example, the circuit court stated that it would have entered a default judgment against DuPont but did not).

With respect to the circuit court's sanctions involving attorneys' fees and costs,

> it is well-settled that courts have inherent equity, supervisory, and administrative powers as well as inherent power to control the litigation process before them. Inherent powers of the court are derived from the state Constitution and are not confined by or dependent on statute. The courts also have inherent power to curb

abuses and promote a fair process, including the power to impose sanctions in the form of attorneys' fees for abusive litigation practices.

. . . Sanctions in the form of attorneys' fees and costs may be imposed by the trial court in accordance with Hawai'i Revised Statutes (HRS) 603-21.9(1) and (6) (1985), which is a legislative restatement of the inherent powers doctrine. Moreover, . . . the inherent power of a court also can be invoked even if procedural rules exist which sanction the same conduct.

. . . .

Although it is well-settled that an appellate court may affirm a judgment of the lower court on any ground in the record which supports affirmance, we believe that, in order to facilitate a meaningful and more efficient appellate review, an order imposing sanctions should set forth findings that describe, with reasonable specificity, the perceived misconduct (such as harassment or bad faith conduct), as well as the appropriate sanctioning authority (e.g., HRCP Rule 11 or the court's inherent power). For purposes of appellate review, a distinction must be made between zealous advocacy and plain pettifoggery.

Whether sanctions are imposed pursuant to [a specific rule of procedure, such as] HRCP Rule 11[,] or pursuant to the court's inherent powers, the importance of specific findings that describe the perceived misconduct and the sanctioning authority is two-fold. First, as previously noted, it allows for more meaningful appellate review as to whether the trial court exercised its discretion in a reasoned and principled fashion. Second, it assures the litigants,

> and incidentally the judge as well, that the decision was the product of thoughtful deliberation, and . . . their publication enhances the deterrent effect of the ruling.

Enos v. Pacific Transfer & Warehouse, Inc., 79 Hawai'i 452, 457-59, 903 P.2d 1273, 1278-80 (1995) (citations, internal quotation marks, original brackets, and footnote omitted).

The circuit court's findings of fact and conclusions of law described with reasonable specificity the perceived misconduct, as well as the appropriate sanctioning authority. Among the many examples of misconduct, DuPont represented to the circuit court that it had previously asserted the work product privilege with respect to the Alta Bush Ranch documents in other Benlate-related cases. However, the circuit court subsequently discovered that this was not true. In conclusions of law 17, 22, 27, and 30, the circuit court stated that specific representations by DuPont to the circuit court regarding DuPont's production of the Alta Bush Ranch documents, as well as whether these documents were privileged under the work product doctrine, "were fraudulent by clear and convincing evidence." (Emphasis added). In conclusions of law 39 and 40, the circuit court also specifically noted that DuPont's misconduct was in bad faith and that the circuit court had inherent authority to sanction DuPont by imposing attorneys' fees and costs:

> 39. This Court finds that Du Pont's conduct as set forth herein constitutes abusive litigation practices and specifically finds that such practices were done in bad faith. This Court may properly assess attorneys' fees under its inherent authority under HRS § 603-21.9(1) and (6) (1985).

> 40. This Court concludes that Du Pont's conduct set forth in the Findings of Fact herein demonstrates that Du Pont engaged in fraud and intentional misconduct which abused the judicial process. Du Pont acted in bad faith, wantonly and for oppressive reasons and, therefore, this Court has inherent authority to levy sanctions, award attorneys fees and costs, and correct judgments and orders.

(Emphases added.)

Because we have interpreted HRCP 60(b)(3) to allow for affirmative relief in this case, and because attorneys' fees and costs were allowed by statute, we affirm the circuit court's sanctions of DuPont and its award of attorneys' fees and costs to Plaintiffs and the Declaratory Defendants.

With respect to the circuit court's reaffirmance of the $1.5 million fine, the circuit court did not increase this fine, but rather, merely reaffirmed it. Therefore, with respect to the $1.5 million fine, the circuit court did not provide any affirmative relief pursuant to HRCP Rule 60(b)(3).

With respect to the circuit court's affirmative relief under HRCP Rule 60(b)(3) in the form of amended findings of fact reflecting the extent of DuPont's discovery fraud and misconduct, we have held that "a correction of the record of a judgment, and a nunc pro tunc entry thereof, may not be made to enlarge the judgment as originally rendered, . . . or to show what the court might or should have decided, or intended to decide, as distinguished from what it actually did decide." *DuPonte v. DuPonte*, 53 Haw. 123, 127, 488 P.2d 537, 541 (1971).

However, the instant case is distinguishable from *DuPonte* because it involves a circuit court's finding supported by clear and convincing evidence that a party made fraudulent representations to opposing parties and to the circuit court. In light of the strong public policy against litigants committing fraud within the courts, we hold, based on the egregious nature of the fraud by DuPont in this case, that the circuit court did not abuse its discretion when it granted the Plaintiffs and the Declaratory Defendants affirmative relief under HRCP Rule 60(b)(3) in the form of amended findings of fact and conclusions of law.

Furthermore, the Liability Defendants waived this particular issue when they failed to argue it in their Joint Supplemental Brief.

The Liability Defendants asserted that it was "beyond the scope of t[heir] 10-page supplemental brief (expressly limited to the propriety of the relief granted below . . .) to address the underlying merits of the trial court's 60-page sanctions order." Liability Defendants' Joint Supplemental Brief at 10 n. 10. However, this statement by the Liability Defendants is not correct. When we granted the Plaintiffs' motion for remand on August 19, 1996, we specifically informed the parties that the Liability Defendants and the Plaintiffs could each submit a ten-page brief "limited to the propriety of the relief granted pursuant to HRCP Rule 60(b) motion." Order in Case No. 19201, filed August 19, 1996, at 3. The so-called "60-page sanctions order" by the circuit court was part of the relief granted pursuant to HRCP Rule 60(b), and, thus, according to the plain meaning of our remand order, we gave the Liability Defendants an opportunity to

address the underlying merits of the circuit court's findings of fact, conclusions of law, and order regarding HRCP Rule 60(b) relief and sanctions against DuPont. The Liability Defendants failed to argue the underlying merits of the circuit court's findings of fact, conclusions of law, and order regarding HRCP Rule 60(b) relief sanctions against DuPont and, therefore, the Liability Defendants waived any and all possible errors with respect to the underlying merits.[8]

Under the circumstances of this case, based on the egregious nature of DuPont's fraud, we construe the HRCP so as not to disallow a remedy under HRCP Rule 60(b)(3) when there is a post-judgment discovery of fraud supported by clear and convincing evidence. Accordingly, we affirm the circuit court's findings of fact, conclusions of law, and order, filed August 22, 1996, regarding the Plaintiffs' and Declaratory Defendants motions for HRCP Rule 60(b)(3) relief and sanctions against DuPont.

G. The Circuit Court's Denial of the Declaratory Defendants' Motion for a New Trial

In their cross-appeal, the Declaratory Defendants contend that the circuit court abused its discretion by denying their motion for a new trial pursuant to HRCP Rule 59(a) in light of newly discovered evidence of DuPont's discovery fraud and misconduct. We disagree.

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[8] Additionally, it should be noted that the Liability Defendants did not move to increase the page limit of the supplemental brief to more than ten pages.

HRCP Rule 59(a) provides that

> [a] new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State[.]
>
> Furthermore, "[b]oth the grant and the denial of a motion for new trial is within the trial court's discretion, and we will not reverse that decision absent a clear abuse of discretion."

United States Steel Corp., 82 Hawai'i at 54, 919 P.2d at 316 (citations and internal quotation marks omitted).

The Declaratory Defendants do not take issue with the circuit court's findings of fact. In reaching its conclusion, the circuit court specifically found that the Declaratory Defendants did not show due diligence in the discovery at issue because they usually took no position regarding discovery motions. Thus, the circuit court denied the Declaratory Defendants' motion for a new trial based on our holding in *Orso*, 56 Haw. at 250, 534 P.2d at 494, in which we stated the following:

> The authorities are in agreement that a new trial based on newly discovered evidence can be granted provided the evidence meet the following requirements: (1) it must be previously undiscovered even though due diligence was exercised; (2) it must be admissible and credible; (3) it must be of such a material and controlling nature as will probably change the outcome and not merely cumulative or tending only to impeach or contradict a witness.

(Emphasis added) (citations omitted).

The *Orso* standard applies regardless of "whether the motion based on newly discovered evidence is made pursuant to [HRCP] Rule 59 or [HRCP] Rule 60(b)(2)." *Matsumoto v. Asamura*, 5 Haw.App. 628, 631, 706 P.2d 1311, 1313 (1985). Because a movant must satisfy all three requirements of the *Orso* standard, even "[a]ssuming, arguendo, the [newly discovered] evidence is material to the issue in question," a circuit court will deny a motion for a new trial when "the [movant] has failed to demonstrate due diligence in the discovery of the evidence." *Orso*, 56 Haw. at 250, 534 P.2d at 495; *see also Deponte v. Ulupalakua Ranch, Ltd.*, 49 Haw. 672, 672-73, 427 P.2d 94, 95 (1967) (affirming a trial court's denial of a motion for a new trial under HRCP Rule 59(a) where "[t]he trial court found that the plaintiff-appellant could have obtained the evidence by diligent search prior to the conclusion of the trial"); *Clement v. Cartwright*, 7 Haw. 676, 678 (1889) (confirming the denial of a motion for a new trial where "[t]he plaintiff's showing of diligence [in procuring evidence wa]s not satisfactory"); *Matsumoto*, 5 Haw.App. at 631, 706 P.2d at 1313 (affirming a trial court's denial of a motion for a new trial pursuant to HRCP Rule 60(b)(2) where the trial court apparently agreed with the defendants' assertion "that if [the plaintiff] had exercised due diligence she would have been able to discover the new evidence prior to trial").

In addition to the fact that the Declaratory Defendants have waived any error in the circuit court's finding that the Declaratory Defendants did not show due diligence in the discovery at issue, the record also supports this finding. For example, although the Declaratory Defendants asserted in their opening brief that they

joined in six of the Plaintiffs' discovery requests, the Declaratory Defendants subsequently conceded in their reply brief that they did not participate in at least three of the six discovery requests.

> There are but few cases tried in which new evidence cannot be hunted after trial, and in order to secure to parties the termination of their legal controversies the Court must be wary about granting new trials upon insufficient excuses for not procuring the evidence when the parties had their day in Court.

Deponte, 49 Haw. at 673, 427 P.2d at 95 (citations and internal quotation marks omitted). Therefore, we hold that the circuit court did not abuse its discretion by denying the Declaratory Defendants' motion for a new trial pursuant to HRCP Rule 59(a).

H. The Circuit Court's Award of Taxable Costs to the Tomono Plaintiffs and the Liability Defendants

The Declaratory Defendants contend that the circuit court erred by awarding taxable costs to the Tomono Plaintiffs and Liability Defendants as a result of their having prevailed against the Declaratory Defendants. We disagree.

"The trial court is vested with discretion in allowing or disallowing costs[.]" *Mist v. Westin Hotels, Inc.*, 69 Haw. 192, 201, 738 P.2d 85, 92 (1987) (citation and internal quotation marks omitted). *See also Bjornen v. State Farm Fire and Cas. Co.*, 81 Hawai'i 105, 107, 912 P.2d 602, 604 (App.1996).

The Tomono Plaintiffs prevailed in their declaratory action against the Declaratory Defendants, and both the Tomono Plaintiffs and the Liability Defendants prevailed with respect to the Declaratory Defendants' counterclaim and cross-claims. Thus, the circuit court awarded costs in favor of the Tomono Plaintiffs and the Liability Defendants and against the Declaratory Defendants, as follows:

> (1) with respect to the Tomono Plaintiffs, $7,654.16;
>
> (2) with respect to DuPont, $11,072.59;
>
> (3) with respect to Platte, United Agri Products, Loveland and Hasegawa, $949.56; and
>
> (4) with respect to Terra International, $1,182.06.

HRCP Rule 54(d) provides that, "[e]xcept when express provision therefor is made either in a statute or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs[.]" Furthermore, HRS § 607-9 (1993) provides the following:

> § 607-9 Cost charges exclusive; disbursements. No other costs of court shall be charged in any court in addition to those prescribed in this chapter in any suit, action, or other proceeding, except as otherwise provided by law.
>
> All actual disbursements, including but not limited to, intrastate travel expenses for witnesses and counsel, expenses for deposition transcript originals and copies, and other incidental expenses, including copying costs, intrastate long distance telephone charges, and postage, sworn to by an attorney or a party, and deemed reasonable by the court, may be

> allowed in taxation of costs. In determining whether and what costs should be taxed, the court may consider the equities of the situation.

(Emphasis added.)

The Declaratory Defendants challenge the circuit court's award of costs on three grounds: (1) that the Liability Defendants were not "prevailing parties"; (2) even if the Liability Defendants were "prevailing parties," the circuit court abused its discretion by refusing to deny costs to the Liability Defendants as a sanction for DuPont's discovery misconduct; and (3) in light of DuPont's discovery misconduct, the circuit court erred by assessing the Tomono Plaintiffs' taxable costs against the Declaratory Defendants, because all such costs should have been assessed against the Liability Defendants.

With respect to the Declaratory Defendants' cross-claim against the Liability Defendants, the jury concluded that the Liability Defendants were not liable to the Declaratory Defendants for soil damage. Therefore, with respect to the Declaratory Defendants' cross-claims against the Liability Defendants, the Liability Defendants were clearly the "prevailing parties." The Declaratory Defendants' assertions to the contrary simply lack merit.

As the Declaratory Defendants correctly assert, HRS § 607-9 provides in relevant part that, "[i]n determining whether and what costs should be taxed, the court may consider the equities of the situation." Thus, although the Liability Defendants prevailed in the Declaratory Defendants' cross-claim against them, the Declaratory Defendants contend that, considering DuPont's pattern of discovery abuse throughout this litigation, the circuit

court theoretically could have denied any award of taxable costs to the Liability Defendants.

However, as already stated, the record shows that the Declaratory Defendants did not exercise due diligence in pursuing discovery against DuPont, and, thus, DuPont's discovery abuse in this matter did not impact the Declaratory Defendants to the same degree that it impacted the Plaintiffs. Considering that the Liability Defendants clearly prevailed against the Declaratory Defendants in their cross-claims, the record does not indicate that the circuit court, in awarding taxable costs to the Liability Defendants, clearly exceeded the bounds of reason or disregarded principles of law or practice to the substantial detriment of the Declaratory Defendants, and, thus, the circuit court did not abuse its discretion in doing so.

The Declaratory Defendants' final contention, that the Tomono Plaintiffs should not have been awarded taxable costs in light of DuPont's discovery abuse, also lacks merit. The Tomono Plaintiffs clearly prevailed against the Declaratory Defendants both in the Tomono Plaintiff's declaratory action against the Declaratory Defendants and in the Declaratory Defendants' counterclaim against the Tomono Plaintiffs. The circuit court held three days of hearings in order to determine the taxable costs to be awarded to the prevailing parties. All parties had an ample opportunity to assert their arguments with respect to any awards for taxable costs. The record does not indicate that the circuit court, in awarding taxable costs to the Tomono Plaintiffs and the Liability Defendants, clearly exceeded the bounds of reason or disregarded principles of law or practice to the substantial detriment of the Declaratory Defendants.

Therefore, the circuit court did not abuse its discretion, and we affirm the circuit court's awards of taxable costs to the Tomono Plaintiffs and the Liability Defendants.

III. CONCLUSION

For the aforementioned reasons, we affirm the judgment and all of the circuit court's orders.

RAMIL, Justice, concurring and dissenting.

I concur with the opinion except with respect to part II.F, in which the majority construes HRCP Rule 60(b)(3) to allow affirmative relief and recovery by the Plaintiffs and the Declaratory Defendants of additional attorneys' fees and costs. While I agree that courts have the "inherent power to curb abuses and promote a fair process, including the power to impose sanctions in the form of attorneys' fees," Majority, op. at 1098, I do not believe that HRCP Rule 60(b)(3) is the appropriate vehicle by which to do so. Moreover, despite Dupont's egregious conduct in this case, the Plaintiffs and the Declaratory Defendants simply were not entitled to relief under HRCP Rule 60(b)(3) in the form of amended findings of fact.

"[W]here the language of the statute is plain and unambiguous, our only duty is to give effect to its plain and obvious meaning." *State v. Wells*, 78 Hawai'i 373, 376, 894 P.2d 70, 73 (1995). Here, the plain language of HRCP Rule 60(b)(3) provides that it may only be used to set aside a prior order or judgment: "the court may relieve a party or his legal representative from a final judgment,

order, or proceeding." HRCP Rule 60(b)(3) (emphasis added). A court may not avail itself of HRCP Rule 60(b)(3) to grant affirmative relief.

Additionally, this court has always deemed the federal courts' interpretation of the FRCP as highly persuasive because our own HRCP were patterned after the federal rules, *see Shaw v. North American Title Co.*, 76 Hawai'i 323, 326, 876 P.2d 1291, 1294 (1994); *Ellis v. Crockett*, 51 Haw. 45, 60-61, 451 P.2d 814, 824 (1969); *Harada v. Burns*, 50 Haw. 528, 532, 445 P.2d 376, 380 (1968). Federal case law interpreting FRCP Rule 60(b), the HRCP Rule 60(b)(3) counterpart, has consistently held that the Rule "is only available to set aside a prior order or judgment; a court may not use Rule 60 to grant affirmative relief in addition to the relief contained in the prior order or judgment." 12 J. Moore, Moore's Federal Practice § 60.25 (3d ed.1997) (footnote omitted). For example, in *Adduono v. World Hockey Ass'n*, 824 F.2d 617, 620 (8th Cir.1987), the United States Court of Appeals for the Eighth Circuit held that

> Under [FRCP] Rule 60(b), the district court may grant relief from a final order or judgment for mistake, newly-discovered evidence, fraud, voidness, satisfaction, or other reasons. [FRCP] Rule 60(b) is available, however, only to set aside a prior order or judgment. It cannot be used to impose additional affirmative relief.

Adduono, 824 F.2d at 620 (citation omitted). Similarly, in my view, the Plaintiffs and the Declaratory Defendants were not entitled to an award of attorneys' fees and costs under HRCP Rule 60(b)(3).

Finally, it is highly questionable that the Plaintiffs and the Declaratory Defendants were in a position to obtain any relief under HRCP Rule 60(b)(3), simply because, for all intents and purposes, they were the "prevailing" parties. Once again, as the majority opinion notes, federal courts have held that a movant seeking relief under FRCP Rule 60(b) must establish (1) by clear and convincing evidence that the verdict was obtained through some form of misconduct, and (2) that such " 'conduct . . . prevented the losing party from fully presenting his case or defense.' " Majority at 1096 (citation omitted, emphasis added). In this case, the Plaintiffs prevailed in their claim, and Dupont's misbehavior did not adversely affect the Declaratory Defendants' cross-claim against Dupont, as stated in the circuit court's finding of fact 97. Therefore, in my view, the circuit court abused its discretion when it granted Plaintiffs' and Declaratory Defendants' motion for relief under HRCP Rule 60(b)(3).

While Dupont's discovery abuses were indeed deplorable and such actions should be dissuaded, I do not believe that HRCP Rule 60(b)(3) provides the sound legal foundation upon which to do so in this case. Accordingly, I respectfully dissent with the majority opinion in part II.F.

[LOGO]

Davis Tree Farms v. DuPont (Company Settles Florida Benlate Cases)

Three days after a Florida trial court judge signed this order in which she concluded that DuPont Co. had acted in bad faith, abused the judicial process and "purposefully set upon a course of conduct that has served as a complete denial of plaintiffs' right to have its day in court," DuPont settled 20 Florida cases against it in which growers claimed the company's fungicide Benlate caused crop damage. The judge's August 5 order struck DuPont's answer and entered a default judgment. As part of the settlement agreement, the parties' lawyers asked the judge to vacate the August 5 written order and to seal it. She agreed.

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY,
FLORIDA GENERAL
JURISDICTION DIVISION
CASE NO. 92-20006 (CA 23)
DAVIS TREE FARMS, INC., a
Florida Corporation; DAVIS TREE
FARMS NORTH, INC., a Florida
Corporation;

Plaintiffs,

vs.

E.I. DU PONT DE NEMOURS & COMPANY, INC., a Delaware Corporation; HELENA CHEMICAL COMPANY, a Florida corporation; MAXWELL FERTILIZER AND FARM SUPPLIES, INC., a Florida corporation; ASGROW FLORIDA COMPANY, a Florida corporation; and CRAWFORD & COMPANY, a Georgia corporation; Defendants.

ORDER ON PLAINTIFFS' MOTION TO STRIKE DEFENDANT DUPONT'S PLEADING THIS CAUSE came before the Court on June 21, 1996 on Plaintiffs' Motion to Strike Defendant DuPont's Pleadings and Enter Default Judgment. The Court has considered the motion, the record, and the arguments of counsel. It is hereby, ORDERED AND ADJUDGED as follows;

1. The allegations that came before this Court on June 21, 1996, are that DuPont conducted a test in Costa Rica with Benlate 50 DF and ornamental plants in September, 1992. When the results of the test were unfavorable to DuPont, DuPont scientist ordered the plants to be destroyed, and then sought to conceal the nature of the test from Plaintiffs in this and other Benlate litigation.

2. These allegations are of a particularly serious nature because if true, they show that DuPont and its counsel have engaged in a deliberate pattern of discovery abuse and fraud before this Court.

I. FINDINGS OF FACT

DuPont's Willful Refusal to Comply with Court Orders

3. Plaintiffs learned of possible tests in Costa Rica in early 1996 and propounded interrogatories and requests for production designed to elicit information about the event.

4. Defendant responded to the interrogatories by giving unintelligible responses to production requests, agreeing to produce documents but never producing them, and claiming that the requested documents were privileged.

5. On April 23, 1996, this Court held a hearing on Plaintiff's request to produce documents related to the Costa Rican tests. At the hearing, the Court ordered DuPont to produce certain requested documents to the Plaintiffs, and to produce all documents over which DuPont claimed a privilege, for in camera inspection.

6. DuPont has repeatedly stated in depositions, filings, and in open court that it has waived work product privilege "in limited areas" with respect to the Monte Vista test site in Costa Rica. Examples of this stated waiver are as follows:

> Mr. McGregor: Your Honor, we basically waived work product, and if we can get the issue of they claim this supposed field trial took place at the Monte Vista site and that is all transpired under this agreement with Welker that he showed to you and a confidentiality agreement with Cefalo and involves Mr. Vargas with respect to the Monte Vista site where this alleged field trial took place, then isn't that the

issue that we're dealing with so they can look at it?

(Transcript of April 23, 1996 hearing, at 36-37).

The Court: It is opinion as opposed to fact. Therefore, if you put in memos facts such as we are going to conduct a field test, that is a fact. Or we have conducted a field test, that is a fact versus an opinion, is it not?

Mr. McGregor: That work product, I believe, has been waived with respect to Monte Vista. (Transcript of June 21, 1996 hearing, at 20).

7. Despite acknowledging that DuPont waived work product privilege with regard to Monte Vista, and despite this Court's April 23, 1996 order, DuPont failed to produce the requested documents.

Among the documents DuPont was required to produce, but did not, were expense records of DuPont employees' trips to Costa Rica. In addition to an agreement with the Plaintiffs re: Additional time to comply with the order, DuPont filed two motions for extensions of time to produce the documents. Over Plaintiff's objections, this court granted DuPont's motion on May 31, 1996 and June 11, 1996.

8. On June 17, 1996, Plaintiffs filed a motion for an emergency hearing because DuPont still had not produced documents which plaintiffs needed to prepare for a deposition scheduled to take place the next day, and because a hearing on Plaintiff's Motion to Strike and Sanctions was scheduled for June 21, 1996. This Court had already continued and reset the hearing to accommodate Defendant's discovery production problems.

9. At the June 17, 1996 emergency hearing which was attended by all counsel telephonically, this Court entered an order requiring DuPont to produce all for the non-privileged documents requested by Plaintiffs within 24 hours, or be subject to a fine of $10,000 for each day DuPont delayed production. After 2 days, if DuPont had not produced the documents, this Court stated that it would strike DuPont's pleading without further hearing.

10. This Court issued such an order because it was apparent that DuPont had intentionally delayed the production for documents for which it had offered no legitimate claim of privilege.

11. Plaintiffs received some of the requested documents from Defendant in the morning of June 18, 1996. At 4:30 that day, Plaintiffs were notified that additional documents responsive to the Court's order were available for Plaintiffs to pick up at Defense counsel's office.

12. Plaintiffs received more documents on Wednesday, June 19th and even as late as 3:15 p.m. on June 20, 1996.

13. This Court was clear in its order of June 17, 1996 concerning production of documents. Additionally, when this court stated that Defendant was to produce the documents, it was clear that the documents were to be delivered to Plaintiffs, not simply made available for Plaintiffs to pick up.

14. At the June 21, 1996 hearing on Plaintiffs' Motion to Strike Defendant's Pleadings, Plaintiffs informed the Court that DuPont had failed to fully comply with the June 17, 1996 order. Plaintiffs presented a cover letter dated June 20, 1996, from DuPont producing relevant

discovery. This denotes a blatant disregard for the Court's order to produce all documents within 24 hours.

15. Additionally, at the June 21, 1996 hearing, Plaintiffs provided the Court with some of the documents DuPont had produced in partial compliance with the order.

16. The documents provided by Defendant DuPont were such poor copies that they were completely illegible. Plaintiffs' counsel informed the court that when he contacted DuPont's counsel about the legibility of the documents, DuPont's counsel informed him that Plaintiffs' counsel could obtain better copies by going to Delaware and requesting them at the Benlate document depository.

17. DuPont has produced these same documents in camera for this court to examine. This court examined the quality of the copies produced in camera and found them to be perfectly legible and of good quality.

18. This production of illegible copies to the Plaintiffs further shows a blatant disregard of the June 17, 1996 order as well as the spirit of the discovery process.

19. DuPont's counsel offered no explanation or contradiction to Plaintiffs' assertion of DuPont's failure to comply with the June 17, 1996 order.

20. Accordingly, this court finds that DuPont willfully failed to comply with its April 23, 1996, and June 17, 1996 orders. DuPont shall pay the fine of $20,000.

Testing at the Monte Vista Site

21. At the June 21, 1996 hearing, Plaintiffs presented the testimony of Richard Cefalo, R.P. Welker, and Leon

Vargas in support of their allegations that DuPont had conducted a field test involving Benlate.

22. The testimony of the three witnesses corroborated one another's account of the events which took place in Costa Rica in September, 1992.

23. DuPont offered the testimony of Dr. Timothy Obrigawitch and Gerald Stephenson to rebut the testimony of Cefalo and Vargas. Dr. Obrigawitch is a scientist for DuPont and has testified in many of their Benlate trials. He was lead scientist for DuPont's Florida field trials. Mr. Stephenson is a salesman for DuPont who has been instrumental in investigating many growers' claims against Benlate.

24. These witnesses testified that they obtained the Monte Vista site simply to root some cuttings to bring into the United States at a later date, and did not conduct any tests. These witnesses denied many of the facts Cefalo and Vargas asserted about the project.

25. DuPont's story concerning Monte Vista has changed several times throughout this litigation.

26. Mr. Stephenson and Dr. Obrigawitch gave several versions as to why they went to Costa Rica originally.

27. Neither Mr. Stephenson or Dr. Obrigawitch could specifically remember which of them requested the specific set up of the Monte Vista site. Neither of them could remember who specifically came up with the idea to root the cuttings.

28. In addition, Mr. Stephenson testified that he had falsified expense reports to DuPont. One meal he listed on his expense report, one he stated he had eaten with

Mr. Cefalo and Mr. Vargas, was simply to recover money had [sic] had paid Mr. Cefalo for supplies while in Costa Rica in September 1992.

29. This Court finds that such testimony indicates Mr. Stephenson's unreliability as a truthful witness.

30. This court finds that the testimony of DuPont's witnesses Gerald Stephenson and Timothy Obrigawitch is unreliable.

31. Every witness for both Plaintiff and Defendant testified as to the presence of Leon Vargas at the Costa Rica site.

32. Mr. Vargas is a Costa Rican national with no interest in the outcome of the litigation.

33. The testimony presented by the witnesses in this case conflicts. This Court, having read the depositions of all witnesses filed in this case, finds that the testimony of Leon Vargas is persuasive, and represents the most accurate account of what occurred at the Monte Vista site in Costa Rica in 1992.

34. While the Court does not believe that memory is perfect after a span of four years, the documents Mr. Vargas produced at his deposition indicate that he understood the events at Monte Vista to be a research project involving Benlate, and that DuPont did not take any steps to dissuade him of that belief.

35. Leon Vargas' testimony, in conjunction with Cefalo's testimony and the documents produced in this case, indicate that DuPont contracted with R.P. Welker Plants to do research on Benlate in Costa Rica at the Monte Vista site.

36. These documents give further evidence that testifying was in fact performed.

37. Leon Vargas' invoice to DuPont for payment of services stated his activities as setting up an experiment in Monte Vista, and asked for fees for consultation regarding the effects of Benlate in ornamental plants.

38. The Welker Services Agreement specifically refers to a research project: "WHEREAS, DUPONT is desirous of conducting confidential research concerning the use and effects of its fungicide Benlate 50 DF; . . . "

39. DuPont employee Erik Seay's travel and expense report states the reason for travel to Costa Rica in September, 1992 was "Benlate field test."

40. This Court is persuaded by evidence presented at the June 21, 1996 hearing that testing occurred at the Monte Vista site in Costa Rica in the fall of 1992.

41. This Court finds that the documentary evidence taken in conjunction with the testimony of the witnesses indicates that there was a research project in Costa Rica involving different concentrations of Benlate 50 DF.

42. This Court finds that DuPont conducted an experiment or test, albeit not strictly adhering to scientific protocol, involving the effect of Benlate 50 DF on plants in Costa Rica in September, 1992.

43. This Court finds that DuPont destroyed plants treated with Benlate 50 DF when they turned black and began to die.

44. This Court finds that DuPont then sought to conceal information about the Monte Vista Site from Plaintiffs.

Statements to the Court

45. DuPont's defense hinges on semantic tricks which flout the Court's authority. DuPont's perception appears to be that if Plaintiffs and the Court do not mention the correct "buzzwords," then DuPont is free to deny any allegation it chooses.

46. At the June 21, 1996 hearing, DuPont supplied the Court with a child's version of Webster's dictionary definitions of "test" and "trial" to support its argument than it did not conduct a test or trial in Costa Rica.

47. DuPont's actions demean this Court authority. By asking it to adhere to dictionary definitions rather than examine the overwhelming evidence that an experiment did in fact take place, DuPont asks this Court to ignore the judicial process. This court does not need a dictionary in this case to guide its ruling; the evidence speaks for itself.

48. When questioned directly by the court on the nature of DuPont's actions at Monte Vista, in order to maintain its untenable position, Defense-counsel addressed only those words Plaintiffs referred to in their requests for production.

The Court: Let me see if I understand this. Are you saying to me that because it wasn't rigorous, or because it wasn't a textbook field trial that it didn't take place, or are you saying to me we can't use these terms and, if they did something, it wasn't really a field trial even if they used Benlate?

Mr. McGregor: What I'm saying to you, You Honor, is that in response to the interrogatory that was asked, we

said there were no tests, no trials, no investigations, no analyses. Our answer was truthful. Our answer was truthful in terms of as they've defined it as, the very beginning of their motion, Costa Rican Benlate field trials, field trials, which I will get to, You Honor, I promise you. Field trials, the Florida field trials, the Hawaiian field trials have a definition, and that definition isn't a test or trial, isn't too different than the one we learned as kids, which says you go through a process and you get some results. This was –

The Court: I don't think you've answered my question.

Mr. McGregor: I'll try again, You Honor.

The Court: My question is very simple, sir. If they went there and if what Mr. Vargas says is true, they did buy the Benlate, they did bring the Benlate and they did dip the plants in Benlate and they didn't use any kind of a control and the plants died and they threw then away, that would not be a test of any kind in your mind and you would be confident that you could say that to a court of law without lying?

Mr. McGregor: *That's correct, Your Honor, under the facts, under the facts in this case, that is correct.* They were rooting cuttings in Costa Rica. They were not doing any types of test of Benlate. The [sic] were not doing any type of field trial of Benlate.

The Court: But did you hear what I said? Even if they dipped them in solutions of Benlate; now did you hear me say that?

Mr. McGregor: I did hear you say that, Your Honor. I heard you say that.

The Court: I want to make sure I understand you and you understood me.

Mr. McGregor: Okay.

(Transcript of June 21, 1996 hearing, at 100-101) (emphasis added).

49. DuPont counsel's blatant defiance of this Court's authority in refusing to depart from such semantical game playing is deliberately evasive and totally inexcusable. The Third District Court of Appeal has faced this situation as well, and has responded aptly:

"By contrast, the tortfeasor in the present case had coverage that was lower than [the plaintiff's] limits. Although Hartford's argument engages in the Alice-in-Wonderland practice of departing from the usual meaning of words, it does not take a leap through the looking-glass for this Court to conclude that the tortfeasor who injured [plaintiff] was 'uninsured' to the extent those injuries exceeded the policy limits. See Lewis Carroll, Through the Looking Glass, (1872) 'When I use a word, it means just what I choose it to mean – neither more nor less.')"

Hartford Insurance Co. v. Minagorri, 675 So. 2d 142, 143-44 (Fla. 3d DCA 1996).

50. Defendant's refusal to acknowledge that the work in Costa Rica in September 1992 constituted an experiment, simply because Plaintiffs did not use the right works in their requests, demonstrates bad faith and contemptuous behavior on the part of DuPont and its attorneys in discovery. DuPont is unilaterally deciding the evidence by determining that words only mean what it chooses

them to mean, "neither more nor less." Hartford Insurance Co. v. Minagorri, 675 So. 2d at 144.

51. This court finds that DuPont engaged in willful and malicious behavior with respect to discovery concerning the research project in Costa Rica in September, 1992.

52. DuPont's argument, that the Motion to Strike simply hinged on one response to one request for production out of roughly 500, again demonstrates to this Court DuPont's utter disregard for the rules of discovery and ethical conduct. If DuPont has misled this Court and Plaintiffs and lied about the nature of their actions in Costa Rica, it is irrelevant if it is one interrogatory or one hundred; the result is the same.

53. This Court finds that DuPont intentionally withheld this crucial information, and denied its existence in an effort to prevent the disclosure to the Plaintiffs and this Court of its action in Costa Rica concerning Benlate 50 DR.

Destruction of Evidence

54. The plants at Monte Vista were destroyed sometime after the test was performed. Plaintiffs were unable to gather information on these plants.

55. Plaintiffs argue that they have been irreparably prejudiced because DuPont destroyed all evidenced [sic] from Monte Vista.

56. Dr. Timothy Obrigawitch ordered Mr. Cefalo to "dump" the plants when Cefalo told him of their deteriorated condition.

57. Mr. Cefalo then told Leon Vargas to "dump the plants." Soon after, Cefalo faxed Vargas, asking him to hold the plants and takes [sic] pictures of them. Mr. Vargas did not save the plants.

58. DuPont argues that Mr. Cefalo's urgent fax requesting that Vargas not dump the plants shows that DuPont did not have control over the destruction of the evidence. Mr. McGregor: " . . . if they felt that there was something wrong with those plants, Your Honor, they wouldn't have dumped them. So who had control over that when you talk about destroying evidence?" (Transcript of June 21, 1996 hearing at 115).

59. Again DuPont engages in the narrowest of semantic distinctions. It submits to this Court that although it was a DuPont run project, although Vargas was paid by DuPont, and although Dr. Obrigawitch had ordered Cefalo and Vargas to "dump" the plants, because Cefalo faxes an urgent message to Vargas asking him not to dump the plants, DuPont did not have control over the evidence.

60. With such legal gymnastics, DuPont again demonstrates its inability to be truthful to this court, and seems to forget the entire body of law on agency.

61. DuPont has made claims in defending other litigation and before this Court that the results of the field tests exonerate Benlate 50 DF as the cause of crop damage.

62. Plaintiffs will have no opportunity to rebut or question the results of the Florida field trials by examining and utilizing the results from Monte Vista.

63. It is clear that DuPont has destroyed the evidence from the "Monte Vista research project." Plaintiffs will never have an opportunity to examine the plants, the medium, or the protocol.

64. DuPont argues that since there is no trial date set in this case, Plaintiff [sic] are not irreparably harmed. Again DuPont asks this Court to ignore the magnitude of its actions. Simply because there is no trial date set does not mean that DuPont can attempt to conceal such evidence by destroying it and willfully disobeying the orders of this Court.

65. This court finds that DuPont's destruction of evidence and refusal to comply with discovery requests to prove same, irreparably harmed the Plaintiffs in this matter, and demonstrates their complete disregard for the canons of ethics and the rules of discovery.

Leon Vargas Work Product Claim

66. DuPont has repeatedly sought to prevent Plaintiffs from obtaining information about its activities at Monte Vista.

67. In furtherance of this, it has delayed discovery, filing motions for protective order to prevent Plaintiffs from taking Leon Vargas' deposition, and then, a motion for return of Vargas work product and seeking sanctions against Plaintiffs' counsel.

68. DuPont did not assert a privilege over the testimony of Leon Vargas until after counsel had spoken with him before his deposition, and discussed his possible testimony. DuPont did not assert that Mr. Vargas was a non-

testifying consultant until after counsel spoke to him about his testimony.

69. Over Defendant's protests, the Special Master in this action, allowed Mr. Vargas' deposition to proceed.

70. During his deposition, Mr. Vargas testified that DuPont's counsel in another action has informed him that since he was a Costa Rican national, he could not be subpoenaed to testify in Florida, and didn't "really have to" give testimony.

71. At his deposition, Vargas clearly stated that he had not done any consulting for DuPont after his confidentiality agreement was signed. He also stated that he had never discussed trial strategies with DuPont.

72. This Court sees Defendant's motion concerning Vargas work product and its previous motion for protective order to be simply more examples of Defendant's tactics to prevent a full and fair exposure of the events at Monte Vista.

Chemdesign and Kirschner

73. DuPont has attempted to thwart discovery in other areas of this litigation as demonstrated by its actions with respect to the depositions of Chemdesign Corporation and Theodore Kirschner. This Court has already sanctioned DuPont for its misconduct in this respect. However, this simply further proves the wilful pattern and practice DuPont has engaged in heretofore.

Ethical Considerations

74. Attorneys are bound by the Florida Rules of Professional Conduct. They have a duty of candor to the judicial tribunal. See comment to Rule 4-3.3, Florida Rules of Professional Conduct, 1996).

75. However, Rule 4-3.4 is particularly apt in describing DuPont's counsel's conduct in these proceedings:

A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor counsel or assist another person to do any such act.

(Rule 4-3.4, Florida Rules of Professional Conduct, 1996).

76. This Court finds that DuPont's counsel violated the letter of these rules in their conduct before this tribunal.

II. Conclusions of Law

The reasonableness of a sanction depends in part upon the willfulness or bad faith of the party. The accidental or negligent destruction of evidence often justifies lesser sanctions directed toward compensating the victims of evidence destruction. The intentional destruction or alteration of evidence undermines the integrity of the judicial process and, accordingly, may warrant imposition of the most severe sanction of dismissal of a claim or defense, the striking of pleadings, or entry of a default. Trammel v. Bass, 672 So. 2d 78, 84 (Fla. 1st DCA 1996) (citations omitted).

77. "Thus, in the case of the intentional alteration of evidence, the most severe sanctions are warranted as much for their deterrent effect on others as for the chastisement of the wrongdoing litigant."

Trammel at 84 (citations omitted).

78. In this instance the court is in the unique position of sanctioning a litigant which has been severely sanctioned in other courts, seemingly to no avail. By striking DuPont's pleadings, this court hopes that this will have a deterrent effect, not only on other litigants, but on DuPont's actions in other cases in the future.

79. "A drastic sanction that denies the availability of the court's processes is therefore appropriate to one 'who defiles the judicial system by committing a fraud on the court.' " Trammel at 84 quoting Aoudad v. Mobil Oil Corporation, 892 F. 2d 1115, 1118 (1st Cir. 1989).

80. Courts have also upheld the sanction of striking the pleadings when litigants have "engaged in bad faith games playing' with the court and opposing counsel in delaying and thwarting the orderly process of discovery." HZJ, Inc. v. Wysocki, 511 So. 2d 1088, 1089 (Fla. 3d DCA 1987).

81. This Court finds that DuPont's conduct constitutes abusive litigation practices and specifically finds that such practices were done in bad faith.

82. This Court concludes that DuPont's conduct as set forth in the Findings of Fact herein demonstrates that DuPont engaged in intentional misconduct which abused the judicial process.

83. This Court determines that DuPont has engaged in a systematic design to thwart discovery. This Court further finds that DuPont's conduct in this regard is so atrocious that it shocks the conscience of this Court. DuPont has destroyed evidence; it has delayed discovery; mislabeled documents at its document depository to thwart discovery; and it has produced totally illegible discovery. DuPont has purposefully set upon a course of conduct that has served as a complete denial of Plaintiffs' right to have its day in court. This Court has no choice but to strike DuPont's pleadings and enter a default judgment.

84. This Court hopes and believes that imposing this fine and striking the pleadings will impress upon DuPont and its counsel the importance of proceeding under the rules of civil procedure and canons of ethics.

85. These sanctions are limited solely to those items outlined above, and in no way reflect on DuPont or its counsel's further involvement in this case and the discovery process.

DONE AND ORDERED in Miami, Dade County, Florida this 5th day of August, 1996, nunc pro tunc as of June 21, 1996.

/s/ AMY STEELE DONNER

CIRCUIT COURT JUDGE

cc: all counsel of record

Exhibit A

In The
Supreme Court of the United States

OCTOBER TERM, 1943

NO. 398

HAZEL-ATLAS GLASS COMPANY, Petitioner,

v.

HARTFORD-EMPIRE COMPANY, Respondent.

On Writ of Certiorari to the Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT, HARTFORD EMPIRE COMPANY.

Walter J. Blenko
Attorney for Respondent.

Francis W. Cole,
Edgar J. Goodrich,
James M. Carlisle,
Of Counsel.

January, 1944.

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* * *

requires that the judgment below be affirmed and that petitioner be held to a procedure by original bill which would protect the rights of both parties.

(2)

There was no fraud in the preparation and publication of the Clarke article, or in its use by respondent in the Patent Office, or in the reference which respondent made to it in its 1931 brief before the Circuit Court of Appeals. The Clarke article was true. Clarke checked the article for accuracy, adopted it as his own, signed it, and sponsored its publication. Consequently, it was Clarke's own article when it was published, and it was so considered by respondent's counsel in good faith. The Clarke article was not material to the 1932 decision of the court below, as the Court of Appeals correctly held.

(3)

The court below correctly held that petitioner had made no timely representations to that court concerning the Clarke article, notwithstanding petitioner's knowledge of the initial authorship of the article; and that petitioner, because of its laches, had no standing to seek the relief for which it petitioned. There is no merit in petitioner's contention that respondent hampered petitioner's investigation of the Clarke article.

Petitioner's inaction has deprived respondent of the testimony of at least three important witnesses, now dead, and therefore amounted to lache as well as lack of diligence.

(4)

Petitioner is barred from seeking the relief, for which it petitions, by its own election to settle its controversy

with respondent and to abide by that settlement so long as the settlement was profitable to it. Petitioner did not disclose its knowledge of the genesis of the Clarke article either to the District court in 1929, fearing that controversy over the article would emphasize its truth, or to the Court of Appeals in 1932 when it elected to enter into a cross-licensing agreement with respondent which settled the infringement controversy between the parties, and which resulted in large profits to respondent. Petitioner, having for years elected to stand upon the judgment of the court below and to affirm the settlement agreement, is not entitled to change its mind and now belatedly seek relief.

(5)

The court below correctly found that the alleged fraud did not prevent petitioner from making a full and fair defense. There was a full adversary trial of the Hazel infringement suit. Petitioner nowhere contends that respondent prevented it from presenting every possible defense, including all pertinent prior art and all proof as to the practicability of that art. Petitioner's failure to present to the courts below its knowledge as to the genesis of the Clark article was by its own choice and not through any act of respondent. Petitioner is now merely seeking reargument of issues already thoroughly litigated. *United States v. Throckmorton*, 98 U.S. 61; *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399.

(6)

The writ of certiorari should be dismissed because the judgment below was based on several grounds, mainly of a factual nature and each sufficient to dispose of the case. This Court has dismissed writs of certiorari in such circumstances.

* * *

Fourth Point

Petitioner is barred from seeking the relief for which it petitions, by its own election to settle its controversy with respondent and to abide by that settlement so long as the settlement was profitable to it.

Without disclosing to the court below its knowledge of the genesis of the Clarke article, petitioner entered into an agreement with respondent which settled the controversy between the parties and under which petitioner profited materially. Petitioner has now been deprived for the time being of its profits from the agreement, but having for years elected to abide by the 1932 judgment in the Hazel infringement suit and to affirm the 1932 settlement based thereon, petitioner is not entitled to the relief it now belatedly seeks.

The precise knowledge that petitioner had of the genesis of the Clarke article and the circumstances surrounding its publication, and the dates on which it acquired such knowledge are set forth above under the Third Point (*supra*, pp. 53-61). Notwithstanding that knowledge, petitioner, without disclosing its information to the court below, or proceeding to take any steps to

pursue the inquiry, *settled its controversy* with respondent before the entry of that court's judgment, took a license under numerous patents, including the patent in suit, and agreed to pay royalties under the license. The agreement was, and is, terminable by petitioner at its option at any time upon six months' notice. Petitioner has never availed itself of this provision.

On May 9, 1941, the District Court for the Western Division of the Northern District of Ohio during the trial of an antitrust suit against respondent, petitioner and others, impounded the moneys payable under the contract by petitioner to respondent and by respondent to petitioner. Except for the effect of the impounding order, the agreement remains in full force and effect (R. 162-3).

The payments made by respondent to petitioner between the date of the agreement and December 31, 1940 exceeded the payments made by petitioner to respondent covering damages for past infringement and royalties by $678,422.26 (R. 162).

Petitioner, by entering into the settlement agreement with full knowledge or opportunity for knowledge of the facts as to the preparation and publication of the Clarke article, elected to stand upon the judgment of the court below and upon the provisions of its contract.

> " * * * The law is clear that he cannot take the benefits of that contract and repudiate its burdens." *McLean v. Clapp*, 141 U.S. 429, 432.
>
> "The power of avoidance for fraud or misrepresentation is lost, if the injured party after acquiring knowledge of the fraud or misrepresentation manifests to the other party to the transaction

an intention to affirm it, or exercises dominion over things restoration of which is a condition of his power of avoidance, except as stated in Section 482". A. L. I. Restatement, Contracts, Section 484. (Section 482 is not in point because it deals only with offers of return performance.)

"So in case of a transaction claimed to be voidable for fraud, if the person defrauded with knowledge affirms the contract either by suing on it or otherwise, he cannot afterwards repudiate it * * * " *Nuveen v. Board of Public Instruction*, 5 Cir., 88 F.2d 175, 181.*

"Silence, delay, acquiescence, or the use of retention of any of the fruits of the contract for any considerable length of time after a discovery of the fraud is in itself an exercise of the option, and constitutes a complete and *irrevocable ratification of the transaction.*" Wheeler v. McNeil, 8 Cir., 101 Fed. 685, 689.

By not exercising its option to cancel the agreement pursuant to its terms and by accepting the large financial benefits of the agreement for *nine years*, petitioner has recurrently affirmed its election and cannot now repudiate it by belatedly seeking to reopen the judgment below.

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* The case cited held there was no election, but the soundness of the proposition quoted is unquestioned.